



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**1321 Plaza East  
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Charleston, WV 25301-1400**

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**Bob Wise  
Governor**

**Ivin B. Lee  
Executive Director**

**VIA CERTIFIED MAIL-  
RETURN RECEIPT REQUESTED**

April 8, 2003

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Henderson, Henderson & Staples  
711 ½ Fifth Ave.  
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PO Box 273  
Charleston, WV 25321-0273

Re. Smith v. United Parcel Service  
Docket Number: EH-57-98; EEOC Number: 17J960123

Dear Parties:

Enclosed please find the Supplemental Final Decision Regarding Damages of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective January 1, 1999, sets forth the appeal procedure governing a final decision as follows:

**April 8, 2003**

**Page 2**

“§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the administrative law judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before an administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the administrative law judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.a. In conformity with the Constitution and laws of the state and the United States;

10.8.b. Within the commission's statutory jurisdiction or authority;

10.8.c. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from an administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact Ivin B. Lee, Executive Director of the commission at the above address.

Yours truly,

  
Phyllis H. Carter  
Administrative Law Judge

PHC/mst

Enclosure

cc: Ivin B. Lee, Executive Director  
Charlene Marshall, Acting Chairperson

**BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**PATTI A. SMITH,**

**Complainant,**

**Docket Number: EH-249-96**

**EEOC Number: 17J960123**

**UNITED PARCEL SERVICE,**

**Respondent.**

**SUPPLEMENTAL FINAL DECISION REGARDING DAMAGES**

**I.**

**BACKGROUND**

On December 23, 2002, an *Amended Final Decision in Response to the Commission's Remand Order* was entered in the above-referenced case. In the *Final Decision*, the undersigned administrative law judge (hereinafter ALJ) directed the complainant to provide to her updated calculations of lost wages and benefits for the period September 2001 to January 1, 2003, within 31 days of receipt of the *Amended Final Decision*. Upon receipt of these calculations, a supplemental order would be issued reflecting the additional lost wages and benefits and statutory interest at the rate of ten percent (10%) *per annum*. Also, the undersigned ALJ awarded the complainant attorneys' fees and costs.

The respondent appealed the *Amended Final Decision* and on January 24, 2003, the Executive Director of the West Virginia Human Rights Commission (hereinafter Executive Director) issued an order granting a stay of the ALJ's *Amended Final Decision*.

Subsequently, complainant filed a motion with the ALJ asking for a telephonic conference

regarding respondent's refusal to submit the calculations of the complainant's lost wages and benefits for the period September 2001 to January 1, 2002. In response, the respondent submitted a request to the Executive Director, arguing, among other things, that the January 24, 2003 order prevents the ALJ from ordering a telephonic conference regarding an update of complainant's lost wages and benefits for the period September 2001 through January 1, 2003.

Upon consideration of the motion and letters filed by the complainant and the letter filed by the respondent, all relating to the ALJ's request that she receive an update of complainant's lost wages and benefits for the period September, 2001-January 1, 2003, the Executive Director issued an *Amended Order Regarding Stay* and ordered the following:

1. The January 24, 2003 *Order Granting Stay* in this case is amended to allow for the submission of an update of complainant's lost wages and benefits for the period September 2001 through January 1, 2003, to Judge Carter no later than March 15, 2003. Respondent shall file its objections no later than March 31, 2003.

2. Respondent is ordered to provide the complainant in a timely manner with the information she needs to correctly provide this Commission and its ALJ with the wage and benefit information that will establish the complainant's back wages and statutory interest for the period September 2001 through January 1, 2003.

3. Judge Carter shall convene any necessary hearings with the parties regarding the submission of calculations of complainant's lost wages and benefits for the period September 2001 through January 1, 2003.

4. Judge Carter shall issue a Supplemental Order that reflects the complainant's lost wages and benefits for the period September 2001 through January 1, 2003, per her *Amended Final Decision* dated December 23, 2003, by April 11, 2003.

5. Because the *Amended Decision* was entered in response to the Commission's remand order, upon receipt of the ALJ's *Supplemental Order* and any appeals filed by the parties, the matter would be set on the Commission's docket.

## II.

### FINDINGS OF FACT

6. The respondent, in a letter dated March 3, 2003, to the complainant, submitted a copy of the wage rates applicable to the Atlantic Area Supplemental Agreement for the period 08/01/01 through 07/31/02, the applicable language contained in 1997-2002 book, a copy of a letter from Ken Hall to Dean Fragale, Labor Manager that describes the current contribution by UPS to the Health and Welfare Fund effective August 1, 2002 and page 62 of the National Master UPS Agreement. The undersigned ALJ received these documents from the respondent on March 6, 2003 by facsimile only after requesting them from the respondent. See attached Exhibit A.

7. On March 6, 2003, the complainant filed by facsimile *Complainant's Calculations of Lost Wages Due to Discrimination in Response to the Administrative Law Judge's Final Decision Dated December 23, 2002*. A hard copy was received on March 17, 2003. See attached Exhibit B.

8. Complainant's total loss wages for the period May 5, 1995 to December 31, 2002 is \$62,045.15, plus interest in the amount of \$36,840.28, for a total loss wage of \$98,885.43.

9. The value of complainant's lost fringe benefits for the period May 5, 1995 to December 31, 2002, is \$76,859.32, plus interest in the amount of \$33,320.38, for a grand total of \$110,179.17.

10. The total wages due the complainant, including the value of loss benefits for the period May 5, 1995 to December 31, 2002, is \$209,064.60.

11. On March 17, 2003, the complainant filed a *Petition for a Supplemental*

*Attorneys' Fee Award* in the Amount of \$5,600.00. See attached Exhibit C.

12. On March 31, 2003, respondent filed by facsimile *UPS's Opposition To Complainant's Calculations* in which it incorporates its petition in support of its appeal of the undersigned ALJ's *Amended Final Decision* dated December 23, 2002. See attached Exhibit D.

13. Respondent in its *Opposition To Complainant's Calculations* renews its arguments that it did not violate the West Virginia Human Rights Act and that it made an unconditional offer of back pay to the complainant on February 1, 2001, and alleges that because complainant rejected this offer, she breached her duty to mitigate. These arguments were rejected by the undersigned in her December 23, 2002 *Amended Final Decision*.

14. Respondent in its *Opposition To Complainant's Calculations* did not present any arguments in the alternative that complainant's calculations were incorrect and did not present any calculations in opposition to the ones presented by the complainant.

15. Respondent in its *Opposition To Complainant's Calculations*, did not specifically oppose the complainant's request for supplemental attorneys' fees and costs.

### III.

#### CONCLUSIONS OF LAW

16. The complainant has prevailed on the issues of liability and damages and is entitled to be made whole.

17. In addition to the back pay award ordered in the December 23, 2002 *Amended Final Decision*, which covered the time period May 5, 1995 to August 1, 2001, the complainant is entitled to an additional back pay award for the period September 1, 2001 to January 1, 2003, with interest assessed at ten percent (10%) simple interest *per annum*. Therefore, complainant's total lost wages for the period May 5, 1995 to December 31, 2002, is \$62,045.15, plus interest in the amount of

\$36,840.28, for a total lost wage of \$98,885.43.

18. In addition to the value of complainant's fringe benefits ordered in the December 23, 2002 *Amended Final Decision*, which covered the time period May 5, 1995 to August 1, 2001, the complainant is entitled to an additional award for the value of her fringe benefits for the period September 1, 2001 to January 1, 2003, with interest assessed at ten percent (10% simple interest *per annum*). Therefore, the value of complainant's lost fringe benefits is \$76,859.20 for the period May 5, 1995 to December 31, 2002, is \$76,859.32, plus interest in the amount of \$ 33,320.38, for a grand total of \$110,179.17.

19. The total lost wages due the complainant including the value of lost benefits for the period May 5, 1995 to December 31, 2002 is \$209,064.60.

20. The complainant is entitled to an additional award of attorneys' fees and costs of \$5,600.00.

#### IV.

#### **RELIEF AND ORDER**

Pursuant to the Findings of Fact and Conclusions of Law herein as well as the undersigned's Amended Final Decision dated December 23, 2002, it is hereby ORDERED, that:

1. Within 30 days of the receipt of this *Supplemental Final Decision*, the respondent shall pay the complainant a total of \$209,064.60 which represents total loss wages and the value of loss benefits including interest for the period May 2, 1995 to January 1, 2003.

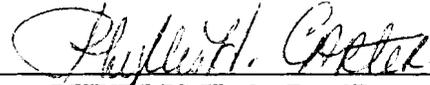
2. Within 31 days of the receipt of this *Supplemental Final Decision*, the respondent shall pay the complainant an additional \$5,600.00 in attorneys' fees and costs for a grand total of \$80,888.14.

3. In the event of failure of the respondent to perform any of the obligations

hereinbefore set forth, the complainant is directed to immediately so advise the West Virginia Human Rights Commission, Ivin B. Lee, Executive Director, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone (304) 558-2616.

ENTERED this 8<sup>th</sup>-day of April 2003.

**WEST VIRGINIA HUMAN RIGHTS COMMISSION**



**PHYLLIS H. CARTER**  
**Administrative Law Judge**  
**1321 Plaza East, Room 108-A**  
**Charleston, WV 25301-1400**  
**Phone: 304-558-2616**  
**Facsimile: 304-558-0085**

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PATTI A. SMITH,

Complainant,

Docket Number: EH-249-96  
EEOC NO. 17J960123

UNITED PARCEL SERVICE,

Respondent.

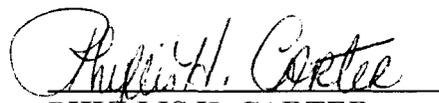
CERTIFICATE OF SERVICE

I, Phyllis H. Carter, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing *Supplemental Final Decision Regarding Damages* by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 8<sup>th</sup> day of April 2003.

Dwight J. Staples, Esq.  
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Huntington, WV 25701

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Charleston, WV 25321-0273

David J. McAllister, Esq.  
REED SMITH, LLP  
435 Sixth Ave.  
Pittsburgh, PA 15219-1886

  
PHYLLIS H. CARTER  
ADMINISTRATIVE LAW JUDGE



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**1321 Plaza East**

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**Bob Wise**  
Governor

**Ivin B. Lee**  
Executive Director

**VIA CERTIFIED MAIL-  
RETURN RECEIPT REQUESTED**

December 23, 2002

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Glenwood, WV 25520

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United Parcel Service  
c/o David J. McAllister, Esq.  
Reed Smith, LLP  
435 6th Ave.  
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Kevin Carr, Esq.  
Spilman Thomas  
PO Box 273  
Charleston, WV 25321-0273

Re: Smith v. United Parcel Service  
Docket Number: EH-57-98; EEOC Number: 17J960123

Dear Parties:

Enclosed please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective January 1, 1999, sets forth the appeal procedure governing a final decision as follows:

December 23, 2002

Page 2

"§77-2-10. Appeal to the commission.

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December 23, 2002

Page 3

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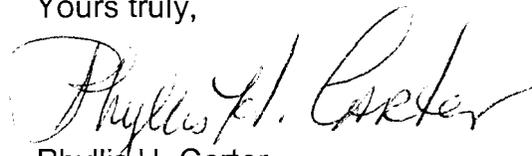
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If you have any questions, you are advised to contact Ivin B. Lee, Executive Director of the commission at the above address.

Yours truly,



Phyllis H. Carter  
Administrative Law Judge

PHC/slb

Enclosure

cc: Ivin B. Lee, Executive Director  
Lew Tyree, Chairperson

**BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**PATTI A. SMITH,**

**Complainant,**

**v.**

**DOCKET NO: EH-57-98**

**UNITED PARCEL SERVICE,**

**Respondent.**

**ADMINISTRATIVE LAW JUDGE'S AMENDED**

**FINAL DECISION IN RESPONSE TO COMMISSION'S REMAND ORDER**

This matter matured for public hearing on August 29, 2001, in the Board of Review Hearing Room at the West Virginia Human Rights Commission, 1321 Plaza East, Charleston, West Virginia pursuant to proper notice. The hearing was conducted on August 29 and 30, 2001 and concluded on October 19, 2001. This hearing was held in response to the Commission's Remand Order of May 15, 2001.

On August 29 and 30, 2001, a Commissioner for the West Virginia Human Rights Commission (hereinafter referred to as the Commission) William Peddicord observed the proceedings. The complainant Patti A. Smith (hereinafter referred to as Ms. Smith) was present and represented by her attorneys, Dwight Staples and Gail Henderson-Staples. The respondent, United Parcel Services ( hereinafter referred to as UPS) appeared and was represented by its counsel, David McAllister and by David Baier, Work Force Planning Manager for UPS. On October 19, 2001, Ms. Smith, was present and represented by her attorneys, Dwight Staples and Gail Henderson-Staples. UPS appeared and was represented by Attorney David McAllister and Dean Fragale, Labor Relations Manager for the Laurel Mountain District for UPS.

Commissioner William Peddicord previously indicated to this administrative law judge (hereinafter ALJ) that he did wish to attend the hearing on this date.

At the parties request and agreement, the date for submission of their proposed findings of fact, conclusions of law and proposed responses to the Commission's questions in its remand order of May 15, 2001, would be submitted to this ALJ on January 31, 2002.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed findings of fact, conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, applicable law, as well as the January 10, 2001 Final Decision and February 27, 2001 Supplemental Decision of Administrative Law Judge Dooley. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

**BACKGROUND**

On May 15, 2001, the West Virginia Human Rights Commission in an order remanded this case by order to an ALJ for further development of the facts and for clarification. The parties appealed the decisions of the ALJ. The Commission found for the complainant but needed clarification and answers to several questions.

Specifically, on May 10, 2002, the Commission stated in its Remand Order that

Administrative Law Judge Dooley's Final Decision was ambiguous and failed to state with clarity the reasoning behind her rulings on the law. The Commission held that the case presented issues of the first instance and inasmuch as it was not possible for the Commission as a reviewing body

to tie her rulings to specific testimony or evidence in the record, the Commission declined to affirm or overturn the Final Decision.

In accordance with 6 W. Va. C.S.R. § 77-2-10-10.7 of its Rules of Practice and Procedure, the Commission remanded the case back to an ALJ for further development of the facts, or where possible, for clarification of Judge Dooley's decision with testimony already on the record. However, the Commission also directed the Executive Director to have an ALJ on staff

**.... to take testimony and issue an amended Final Decision on the specific questions furnished below. The judge shall be guided by and incorporate any credibility findings of the previous judge in areas not affected by this order. Further, the ALJ shall rule on all post-hearing motions that are part of this case. (Emphasis added).**

Further the order provides that:

THE ALJ IS DIRECTED TO TAKE TESTIMONY ON THE FOLLOWING  
QUESTIONS:

1. **As to the ALJ's finding that the Complainant is a person with a disability:**

(See Conclusions of Law of the ALJ'S Final Order). It is the Commission's position that a person with depression could be a person with a disability; however, the ALJ was not specific about what led her to that conclusion.

Therefore, the Commission wishes guidance on the following;

A. Judge Dooley found that Ms. Smith is disabled. In order to meet this burden, Ms. Smith must show that she has a mental or physical impairment which substantially limits one or more of a person's major life activities.

In which major life activity is Ms. Smith substantially impaired?

B. If the ALJ finds that the Complainant is a person with a disability, then what is the connection between complainant's "disability" and her inability to perform the essential functions of her job as a loader / unloader with UPS?

II. **As to the accommodation issue:** Is Ms. Smith claiming that she could not perform the essential functions of the position of loader / unloader, but another position existed for which she was qualified? If so:

A. When and how did the complainant ever request two part time jobs as an accommodation? Was there any interactive process between the Complainant and Respondent?

B. Why can the Complainant perform two part time jobs better than the one full time job? What are the essential functions of the two jobs?

C. As to the Complainant's present position as a chemical operator, what are the duties of that position? How does it differ significantly from the position Complainant held with UPS?

III. **As to damages—**

A. The ALJ chose July 10, 1999 as the date from which to calculate back wages. What date does the Complainant believe is more appropriate?

B. Why were the incidental damages increased from \$1000.00 the date of the first order to \$1600.00 in the supplemental order?

- C. It is the Commission's directive that since this case was originally heard over a year ago, that the ALJ convene a hearing and issue a Final Decision as expeditiously as possible, while affording the parties all rights. Once the ALJ takes the necessary testimony to answer the above questions, he/she should issue a Final Decision which specifically resolves the above concerns. The Order will be appealable to the Commission.

**B.**

**FINDINGS OF FACT**

1. The transcripts of the hearing held on June 30, 1999 and July 9, 1999; and Findings of Fact and Conclusions of Law; the Discussion; Order, in the Final Decision of Judge Dooley dated January 10, 2001; and the February 27, 2001 Supplemental Decision regarding the attorney fees and cost are adopted, incorporated and made a part of this decision except where the Final Decision and Supplemental Decision are contrary to the Findings of Fact, Conclusions of Law, Relief and Order in this Amended Decision in Response to Commission's Remand Order. (See Commission's Exhibits 1 and 2 attached herewith).

**Complainant's Employment History with UPS**

2. Ms. Smith began her employment with UPS in May 1980. She worked part-time as a loader and unloader. (Hr. Tr. June 30, 1999, Vol. I, p. 154 and Hr. Tr. August 30, 2001, Vol. II, p. 55).

3. The job description of a loader / unloader is attached as Commission's Exhibit 3.

4. Ms. Smith testified that she was responsible for unloading packages out of a 40-foot or a 26-foot trailer. She pulled the packages on a roller with the labels facing up and pushed them ever so often to keep them moving. (Hr. Tr. June 30, 1999, Vol I, p. 155 and Hr. Tr. August 30, 2001, Vol, II, p. 56).

5. On occasions, Ms. Smith did load trailers; but, she unloaded more than she loaded. (Hr. Tr. June 30, 1999, Vol I, p. 156).

Ms. Smith worked as a loader / unloader for three years. (Hr. Tr. June 30, 1999, Vol, I p. 156 and Hr. Tr. August 30, 2001, Vol, II, p. 5 9).

7. Ms. Smith was also a sorter during the same three-year period. (Hr. Tr. June 30, 1999, Vol I, p. 157).

8. The job description of a sorter is attached as Commission's Exhibit 4.

9. Ms. Smith was a primary sorter. She sorted packages to five other belts. (Hr. Tr. Vol. I, June 30, 1999, p. 158 and Hr. Tr. August 30, 2001, Vol. II, p. 57).

10. Ms. Smith did not have contact with the public. (Hr. Tr. August 30, 2001, Vol. II, p. 58).

11. It is undisputed that Ms. Smith was able to meet the requirements of the job descriptions of loader / unloader and primary sorter.

12. In the fall of 1983, Ms. Smith worked part-time as a feeder-dispatcher.(Hr. Tr. June 30, 1999, Vol. I, p. 159). She worked in this position for approximately six months. (Hr. Tr. June 30, 1999, Vol. I, p. 162).

13. Ms. Smith describes the position of feeder-dispatcher as one who met the semi-tractor-trailers that arrived at the South Charleston Center from other locations and would tell the driver what dock to pull in for unloading and what load to hook onto. Also, she indicated that "she received calls from feeder drivers who might have had road problems and would be late arriving. In addition, she broke the

“seal” on the back of the truck and would make sure that certain “e-regs” were put on the back of the tractor-trailer before it pulled out.” (Hr. Tr. Vol. I, June 30, 1999, p. 160 and Hr. Tr. August 30, 2001, Vol. II, pp. 59-60).

14. Ms. Smith worked out of the South Charleston Center during the years she worked as a loader / unloader, primary sorter and feeder-dispatcher. ( Hr. Tr. June 30, 1999, Vol. I, p. 161).

15. Ms. Smith was required to drive during the years she worked as a loader / unloader, primary sorter and feeder-dispatcher. (Hr. Tr. June 30, 1999, Vol. I, p. 160).

16. Six months after working as a feeder-dispatcher, Ms. Smith transferred to the Huntington Hub where she worked for three years as a part-time supervisor. She supervised “a handful of people that loaded the pre-load.” ( Hr. Tr. June 30, 1999, Vol. I, p. 161 and Hr. Tr. August 30, 2001, Vol. II, pp. 61-62).

17. In 1986, Ms. Smith returned to the Charleston Hub as a full-time package car driver. ( Hr. Tr. June 30, 1999, Vol. I, p. 161 and Hr. Tr. August 30, 2001, Vol. II, p. 62).

Ms. Smith described her responsibilities as a package car driver as follows: In the mornings you’ve got to get your supplies gathered up, make sure you have a dolly and your dyad [phonetic] board and all your call tags and one-shots and all your supplies you’re going to need. Before you leave the building, you have to pre-trip your car, make sure the horns work . . . the lights work, everything is okay to go out on the road. They really want you to be out of the building within an eight -minute time allowance if possible. And then once you’re out on the road, of course, you’re dealing with, you know traffic and weather and customers and can you get to the unload docks, can you get down the alleys, you’ve got air packages you have to be certain places at certain times with air packages, you’ve got hazardous materials you’ve got to worry about. Again, you’ve got your one shots, your call tags you’ve got to address through the course of the day. You’ve got the public to deal with, you’ve got kids hanging off your back bumper roller-blading and you’ve got dogs coming

out around the side of the houses chasing you and you've got to worry about putting the packages out of sight, out of the weather, you're handling C.O.D.'s you handle a lot of money sometimes. ( Hr. Tr. August 30, 2001, Vol. II, p. 63-64 and Hr. Tr. June 30, 1999, Vol. I, pp. 166-167).

18. Ms. Smith would work "8, 9, 10, 12 hours or whatever it took to get those packages off that truck and get them delivered." ( Hr. Tr. June 30, 1999, Vol. I, p. 166).

20. Ms. Smith stated that she had signs of a mental impairment in 1991. She would become irritable, could not sleep at night because of job fatigue and could not concentrate and was overwhelmed with the duties of her job as a package car driver. (Hr. Tr. June 30, 1999, Vol.1 p. 167).

21. Ms. Smith's symptoms became worse in 1993. She testified that she "could not sleep, lost 20 pounds; lost hair; and would cry excessively. She further testified that she would get home after her shift, lock the door, shut off all the lights, sit and rock with her pillow, would not answer the phone or talk with her parents and was totally withdrawn and isolated. (Hr. Tr. June 30, 1999, Vol.1 pgs. 168-169).

Ms. Smith testified that she would self medicate on the weekends by abusing alcohol so she could sleep. (Hr. Tr. June 30, 1999, Vol. 1 p. 170).

23. Ms. Smith testified that she was irritable at work, started having absentee problems and confrontations with customers. During this time she received two (2) letters of warning. (Hr. Tr. June 30, 1999, Vol. 1 pgs. 173,174).

24. Angela Hatfield, UPS center manager, noticed Ms. Smith's physical demeanor and asked her if she was getting enough sleep and whether she had lost weigh. (Tr. June 30, 1999, Vol. 1 p. 176).

25. On September 28, 1994 she had an accident while employed as a package car driver with UPS. (Hr. Tr. August 30, 2001, Vol. II, pgs.55, 56).

26. Ms. Smith's injuries were to her neck, left arm and shoulder area. (See Ms. Smith's deposition, Respondent's Exhibit FFF pgs.12 and 13).

27. Ms. Smith was off from work as a result of the accident from the end of October, 1994 until March 1995 when she went in the hospital for a hysterectomy. (Hr. Tr. August 30, 2001, Vol. II, pgs. 67, 68 and Ms. Smith's deposition, Respondent's Exhibit FFF p.13).

28. Ms. Smith's gynecologist released her to go back to work in May 1995. (Ms. Smith's deposition, Respondent's Exhibit FFF p.16).

Although Ms. Smith was released to go back to work because she had recovered from the hysterectomy; she had problems with going back as a package car driver because of certain uncontrollable variables associated with the job.

30. Ms. Smith was terminated from her employment on December 5, 1995 by the Center Manager because she failed to return to work. Dr. Hayden sent a letter to UPS saying that Ms. Smith could return to work, but Dr. Hayden never told Ms. Smith that she could return to work. (Hr. Tr. August 30, 2001, Vol. II, pgs. 91-94).

31. Ms. Smith filed a grievance against UPS through her union on May 3, 1995. (Hr. Tr. August 30, 2001, Vol. II, p. 98).

### **Union Involvement-An Interactive Process**

Ken Hall, was President of the Teamsters Union Local 175 at the time of his testimony. Mr. Hall had been a member of the Union for 23 years and a business agent representing employees since 1987. Local 175 is made up of approximately 3700 members. Mr. Hall assisted in negotiating the collective bargaining agreement that was in effect in 1995. (Hr. Tr. Vol. 1, June 30, 1999, pgs. 40-41).

33. Ms. Smith contacted Ken Hall and filed a grievance under the provisions of the labor agreement. She requested that the company provide her with eight hours of work per day in a non-driving position. (Exhibit 29). (Hr. Tr., Vol. I, ; Hr. Tr. II, Vol. II).

34. Ms. Smith contacted Ken Hall and informed him that she was unable to return to work as a package car driver but was physically able to do other warehouse work.

35. On June 16, 1995, Ms. Smith, Ken Hall and UPS management met to discuss Ms. Smith's grievance.

36. During the meeting, Ms. Smith became extremely agitated and stated "not wanting to be like someone from the post office that has to kill someone to make a point." She told the participants in the meeting of an instance where she "felt like running over [a woman] with the package car". Because of these remarks, UPS referred her to Dr. P. Bradley Hall, the clinical director at the Medbrook Medical Center. (Hr. Tr. June 30, 1999, Vol. 1, pgs. 297 - 300).

On August 3, 1995, Dr. P. Bradley Hall wrote a letter to UPS regarding his assessment of the complainant. Hall wrote, in pertinent part, as follows:

Based on her history, physical, and evaluation I would agree that the patient is depressed, and improved in her depression on Prozac, psychotherapy, and avoidance of the work place, I also feel that there is likely a co-existing diagnosis which may include an underlying personality disorder or hyper manic state. This co-existing diagnosis needs further attention and evaluation by an independent, licensed psychiatrist. She would most likely benefit from further evaluation with MMPI at a minimum, as well as a personal consultation with this psychiatrist. I would also be interested to see if he would agree with me that I feel she could benefit from inpatient evaluation in a psychiatric hospital for intensive psychotherapy and medication adjustment.

At this time I have taken the liberty of referring her to Dr. Terry Pritt at Chestnut Ridge Hospital in Morgantown. Her appointment is 08/08/95. In the interim, pending further evaluation by this psychiatrist I would strongly recommend no further employment in any capacity with United Parcel Service. She has shown some behavior and thought processes consistent with being a danger not only to herself, but to those in society as well as fellow workers. In the best interest of the patient, the public, and the work place, I feel she should not be employed in any capacity until her evaluation is complete.

38. On August 8, 1995, the Ms. Smith was evaluated by Dr. Terry G. Pritt of Morgantown, West Virginia. Dr. Pritt is an assistant professor in the Department of Medicine and Psychiatry at the West Virginia School of Medicine. He diagnosed Ms. Smith with "major depression". In Dr. Pritt's report, he wrote the following recommendations:

Pat should continue on her medication and psychotherapeutic regimen as prescribed by Drs. Vincent and Hayden. Pat has established a good therapeutic relationship with both of these professionals and this should be fostered.

I would encourage her employers to work with Pat and her therapist and psychiatrist in Huntington to work out an agreement in which Pat may be able to go back to work. Pat displays an enthusiastic response in getting back to work but at the same time, does not want to see her mental and physical health compromised.

Pat does not, in this interviewer's opinion, present an active danger to herself and others at the present time. By continuing in a therapeutic relationship with Drs. Vincent and Hayden, her stress levels may be continuously monitored with appropriate intervention as necessary.(Exhibit L, Hr. Tr. October 19, 2001, Vol. 3, p. 11).

39. On or about June 16, 1995, Ms. Smith had been forced to file another grievance through her union wherein she requested an accommodation in that she be removed as a package car driver to an

inside job. (Hr. Tr. June 30, 1999, Vol. 1, p. 209). The Union and UPS agreed to be bound by the third party agreement in the Union Collective Bargaining Agreement. That agreement reads as follows:

The Employer reserves the right to select its own medical examiner or doctor and the Union may, if it believes an injustice has been done to an employee, have said employee re-examined at the employee's expense. If the two (2) doctors disagree, the Employer and the Union shall mutually agree upon a third (3<sup>rd</sup>) doctor within ten (10) working days, whose decision shall be final and binding on the Employer, the Union and the Employee. Neither the Employer nor the Union will attempt to circumvent the decision of the third (3<sup>rd</sup>) doctor and the expense of the third (3<sup>rd</sup>) doctor shall be equally divided between the Employer and the Union.

**If the third (3<sup>rd</sup>) doctor agrees that the employee should be returned to work, the Employee shall be reimbursed at his/her daily guarantee, less any monies received back to the date of the examination by the company doctor.** It shall exclude any time the Employee was not available for examination or work. (Exhibit 29 Hr. Tr. June 30, 1999, Vol. 1).

40. Ms. Smith informed Mr. Hall that she would return to work soon. She stated that her psychotherapist and psychiatrist recommended to UPS that the company accommodate her by allowing her to work inside and not as a package car driver. (Hr. Tr. June 30, 1999, Vol. 1, pp 191-192).

41. Ken Hall talked to Wade Caldwell, the labor manager at UPS about Ms. Smith getting a non-driving job.

42. Ken Hall presented uncontroverted testimony that he delivered two (2) medical releases to UPS management from Ms. Smith's mental health providers that stated Ms. Smith should be placed in a non-driving position inside the warehouse. (Hr. Tr. June 30, 1999, Vol. I, pgs 191-193).

43. Ms. Smith did not have enough seniority to bump any full time employees which is why she asked for two part-time jobs.

44. UPS had made accommodations for three male employees who had physical impairments.

45. Jack Dent, a former package car driver had rotator cuff surgery. He was given two (2) part-time jobs on different shifts working in and around the warehouse. (Hr. Tr. August 29, 2001, Vol. 1, p. 200).

46. Kenneth Maynard, also a former package car driver with diabetes was given two (2) part-time jobs at the Charleston Hub. (Hr. Tr. August 29, 2001, Vol. pgs.200 - 201).

47. Bobby Beavers was another package car driver who had a physical impairment but was given a reasonable accommodation that permitted him to work two (2) part-time jobs. (Hr. Tr. August 29, 2001, Vol. 1, p.201).

48. On direct examination, Ken Hall stated the following:

Q. Let me ask you about this right now. Have there been accommodations made for employees who have physical impairments as opposed to mental impairments?

A. **There has been.**

Q. And did the Company in the past accommodate individuals with physical impairments by allowing them to work two part time jobs?

A. **Yes, they have.**

Q. If you know, sir, could you give me the names of some of the individuals where the Company has made an accommodation to an individual who has a physical impairment as opposed to a mental impairment?

A. **One was a package driver in the Charleston center by the name of Jack Dent. Jack was a long-term package driver and he had, I believe, rotator cuff surgery and was not able to perform his normal duties as a package driver and he was given a job as a car washer and some other duties which is inside work. The other is—that I'm aware of—**

Q. Let me ask you about Jack Dent. Was he given two part time jobs?

A. **Yes, he was.**

Q. And at that time, that Mr. Dent was given two part jobs, do you have an approximation as to the time period?

A. **I'm sorry, I didn't understand the question.**

Q. Do you have an approximation as to the time period when he was allowed to work two part time jobs by the Respondent?

A. **I believe that was in 1994.** I know that it was an issue. **He had been allowed to do that prior to the grievance of Pat Smith, because it" one of the issues that was raised.** (Hr. Tr. Vol. 2 p. 47-49).

Q. No you were telling me about another individual who was involved where the Company had allowed that individual who was involved where the Company had allowed that individual to work two part-time jobs?

A. **Another individual in Charleston by the name of Kenny Maynard. I believe Kenny has diabetes. And he was and is currently working two part time jobs.**

Q. And was that as a result of an accommodation made to Mr. Maynard by the Respondent Company?

Mr. McAllister: Objection. Leading.

Judge Dooley : Mr. Staples, if you'd rephrase please?

By Mr. Staples:

Q. How did it come about , sir, that Mr. Maynard was allowed to work two part-time jobs?

A. **The Company made an accommodation as a result of him being disqualified, DOT disqualified.**

Q. And was that a physical impairment as opposed to a mental impairment?

A. **That would be a physical impairment.**

Q. If you know, in the case of Kenny Maynard, about what time frame are we talking about when he was allowed to work two part-time jobs?

A. I'm not certain. Again, I know that Kenny Maynard was working two part time jobs during the time we were processing the grievance for Pat Smith.

Q. So it occurred prior to the May 2nd – or 3rd, 1995 letter?

A. **I believe it did. At some point during the grievance process I know that that was an issue. It could have been at or about the same time frame. Certainly he was performing that job during the time we were discussing Pat's grievance.** (Hr. Tr. July 9, 1999, Vol. 2, pgs. 49-51).

49. In his letter dated April 4, 1995, Ken Hall explained that Ms. Smith objected to working split shifts because she would have to drive from Huntington to Charleston twice daily. His testimony regarding Ms. Smith's objection to working split-shifts is as follows.

**...There was some discussion, not an offer.** There was a lot of discussions, but what the company had at one point at least mentioned was that perhaps she could work pre-load shift, which starts at about 4:00 in the morning and finished about 8:00, and combine that with a shift in the afternoon, which would mean that she would have to make two trips to Huntington, which I frankly thought was unreasonable. And when I say Pat's objection to this is if the company mentions something to me I have an obligation to say to the grievant, hey, this is what we're talking about, what's your feelings about this. She did object to it. She thought that would be unreasonable and so did I. But this is no way – I was in no way suggesting that she would not work two part-time shifts. I was referring to what is commonly called split shifts.

BY MR. STAPLES (cont'd.):

Q. What do you mean by split shifts?

A. **Split shifts means you work a shift, you go home, you come back. That is something that frankly, it's something that's not reasonable, it's something that the Union contests – has contested many times in the contract. We're talking about – I'm talking about two part-time shifts to get an eight hour day. Two part time shifts that are back to back.**

Q. Okay.

- A. **When I said separate here, and perhaps I was trying to explain to someone who is not accustomed to UPS, what we commonly refer to as split shifts, and that's evidenced by the fact that the last sentence in that paragraph I state that the objection is making two round trips to Huntington, from Huntington to Charleston. There is no objection to working two shifts because I already told you, and maybe I wasn't very clear the last time I testified about this, but the only way to get eight hours is to work two part-time shifts of some sort. (Hr. Tr. August 29, 2001, Vol. 1, pgs. 205-206).**

50. UPS was unable to produce any credible evidence of "undue hardship" since Ken Hall presented evidence that "no grievances" were filed as a result of the accommodation made for Kenny Maynard and Jack Dent. (Hr. Tr. July 9, 1999, Vol. 2, p. 50). Also Ken Hall testified that at the time Ms. Smith asked to be reinstated with an accommodation, there was inside work available. (Hr. Tr. July 9, 1999, Vol. 2, p. 45).

#### **Ms. Smith's Medical Condition**

51. A preponderance of the evidence supports a finding that at the time of Ms. Smith's employment with UPS, she suffered from the following mental impairments: Depression, obsessive compulsive disorder, schizoid traits and obsessive compulsive personality disorder with paranoia traits. These mental impairments have continued since Ms. Smith was discharged from her employment. These impairments caused Ms. Smith to be substantially impaired in the following major life activities: **work and sleep**. (Emphasis mine). (Hr. Tr. August 29, 2001, Vol. 1, pp. 74-78).

52. A thorough review of the June 30, 1999; July 9, 1999; August 29-30, 2001; and October 19, 2001 hearing transcripts reveal the following information regarding Ms. Smith's disability:

**Dr. David John Humphreys- Board Certified Psychiatrist**

53. Ms. Smith agreed to a third doctor medical assessment in 1998. She and UPS agreed that she would be evaluated by Dr. David John Humphreys.

54. Dr. David John Humphreys, a board certified psychiatrist with New Hope Christian Counseling Center, received a letter dated August 19, 1998, from Cathy Cline, RN, Occupational Health Supervisor for UPS requesting that he evaluate Ms. Smith. Dr. Humphreys initially saw Ms. Smith on September 8, 1998 and again for a second visit on September 18, 1998. He opined that Ms. Smith had a diagnosis of major depression, obsessive-compulsive disorder, probable post-traumatic stress disorder and a personality disorder. When asked about his diagnosis at the June 30, 1999 hearing, Dr. Humphreys testified as follows:

Q. Do any of the diagnoses that you found, Doctor, do they interfere in your opinion or did they interfere in your opinion with Ms. Smith's ability to interact with others appropriately?

A. **Yes, they did.**

Q. How is that and could you explain?

A. **The depression though significantly better, there were still residual symptoms. In addition, she was requiring medication for the treatment of her depression. The same medications that treat her obsessive-compulsive disorder as well. I think, in addition, it's important to be aware that because of her very inflexible style, it's very hard for her to handle stressful situations. It's very hard for her to adapt to situations that require significant pressure so I felt that these were very significant issues in making my decisions. (Hr. Tr. June 30, 1999 , Vol. 1, pgs. 31-32) ..."it was my finding that she has difficulty interacting with others in the course of high pressure, demanding situations when there is potential danger involved." Id.**

55. In his *Independent Medical Evaluation*, Dr. David John Humphreys diagnostic impression was as follows:

DIAGNOSTIC IMPRESSION: DMZ-IV

- Axis: I: Major Depression, recurrent, severe, in fairly good remission, although still some symptomatology. Obsessive Compulsive Disorder Probable Post Traumatic Stress Disorder type symptoms associated with the difficulty of obtaining resolution of issues regarding ability to work.
- Axis: II. Mixed personality disorder with obsessive compulsive traits.
- Axis III. Status post hysterectomy, status post motor vehicle accident on the job, possible fibromyalgia.
- Axis IV. Severe and enduring including job motor vehicle accident, administrative conflicts and perceived harassment.
- Axis V. GAF 60 to 65 at present time-60-65 in the past.

RECOMMENDATIONS: Ms. Smith will continue to require ongoing psychotherapy and medication management. She is able to do structured jobs; however, **not able to drive as a package car driver**. Based on the patient's description she is able to do work as she previously did in the warehouse. She is well motivated to work and because of her obsessive compulsive features she must be able to do a job well. The difficulties she has experienced in driving reflect a combination of problems from her depression, plus her need for structure. She has significant difficulty making changes and being flexible. At this time, she is still not able to handle the ongoing demands of being required to continuously perform under pressure and always changing situations. The duties of driving as a package car driver certainly exceed her ability to cope. She is comfortable with her present psychiatric follow up which includes Debbie Crump as case manager at Presteria and Dr. Sablay every three months or as needed. It is important to note that while in the past there were concerns as to whether she was a potential harm to self and others, she is not a present danger to herself or others. She is, however, **permanently disabled from performing the duties of a package car driver**. She

**is however able to do structured work, consistent with her prior work for UPS as a warehouse employee.** (Emphasis added). This is confirmed by her ability to continue working since May 1996 for BASF. While I have significant additional documentation, both from my assessment and previous records, further content is not felt to be of any significance in rendering this decision. In addition, there was no information provided by the company that has in anyway affected my ability to render an independent decision and assessment in this case. (Emphasis mine). ( Hr. Tr. June 30, 1999, Vol. 1, Exhibit 28).

56. Furthermore, Dr. Humphreys stated that when given the task of operating a motor vehicle, Ms. Smith is able to do that. When given the task of meeting the public, having them sign as an operator would do, all of those specific tasks can be done. The difficulty is “putting it in combination of a demanding workday that requires frequently, the expectation was 9.5 hours per day. Often the days might be longer than that, I suspect, but I guess that’s my own impression. Even working eight to nine hours a day doing that in heavy traffic, having to make all of the stops they have to make, dealing with other drivers on the road, under pressure of maintaining a job schedule, my impression is that she is not able to perform that task.” ( Hr. Tr. June 30, 1999, Vol. 1, pgs. 35,36).

57. Also, Dr. Humphreys testified that Ms. Smith could not perform the job as a package car driver based on a combination of Axis I and II of her *DIAGNOSTIC IMPRESSION: DMZ-IV*. (Hr. Tr. June 30, 1999,. Vol.1, p. 84).

**Mr. Richard Vincent - Psychotherapist**

58. In January 1995, Ms. Smith began treatment with Richard Vincent, a psychotherapist. (Hr. Tr. June 30, 1999, Vol. 1, p. 181). He treated her from January 1995 through October 27, 1995 once weekly. ( Hr. Tr. June 30, 1999, Vol. 1, pgs. 181 - 182).

59. In a letter to UPS dated November 2, 1995, Richard Vincent requested that Ms. Smith be placed in a structured work environment (Ht. Tr. June 30, 1999, Complainant's Exhibit Number 10).

60. In his affidavit offered at the July 9, 1999 hearing, Richard Vincent stated the following with regard to Ms. Smith:

\*\*\*

3. I have treated Patti Smith.
4. That it is my opinion that Patti Smith suffers from Depressive Disorder with Paranoid traits.
5. The symptoms of these illnesses are avoidance of certain things or situations, extreme emotional reactions to small things, inability to sleep properly, constant questioning and need for reassurance, concern over little things and details, repetitive and rigid behavior, fear of contamination, fear of causing harm to another, fear of behaving in a socially unacceptable manner, worry, hopelessness, helplessness, irrational suspicion of others, and suicidal ideation.
6. That Patti Smith suffers from some of these symptoms such as rigid and repetitive behavior, excessing appropriate anger, inability to sleep properly, irrational suspicion of others, and inflexibility in matters of judgment.
7. That Patti Smith's illness is a condition that **substantially limits one or more of Patti Smith's major life activities including the major life activity of working.**" (Emphasis mine). (Hr. Tr. July 9, 1999, Vol. 2, Exhibit YY1).

61. On April 7, 1995, Richard Vincent, Ms. Smith's treating psychotherapist at the time, sent a letter to UPS requesting a reasonable accommodation for her. He wrote that he had seen Ms. Smith for ten psychotherapy sessions since January 11, 1995. Dr. Hayden had seen Ms. Smith twice. Richard Vincent diagnosed Ms. Smith with "**Mood Disorder not otherwise specified (269.90) and Personality**

**Disorder Not Otherwise specified with Obsessive traits** (301.9). Additionally, she has had numerous medical problems (e. g. Hysterectomy) which are most likely contributing to psychological difficulties.” He recommended, if at all possible, she return to a structured work setting, as opposed to a setting with variables (such as traffic, congestion or dissatisfied customers) beyond her control. Further, he indicated that he would continue to provide psychological services to her. (Emphasis mine). ( Hr. Tr. June 30, 1999, Vol. 1, Complainant’s Exhibit No. 3).

62. At the June 30, 1999 hearing, when asked to explain what he meant when he wrote that Ms. Smith would be able to function in a moderately structured work environment, Richard Vincent opined that Ms. Smith was not able to function in a stressful work environment where she was required to make a lot of changes, where there would be obstacles preventing her from performing her assigned tasks, and just any miscellaneous stressors which would be difficult for her to deal with. He indicated that he would not want her out driving. ( Hr. Tr. June 30, 1999, Vol. 1, p. 340).

63. When asked if there were other jobs Ms. Smith could not perform, Richard Vincent opined that Ms. Smith could not perform jobs dealing with interfacing with the public, such as sales where you have to produce so many items, where there was competition and heavy demands from a supervisor to perform these tasks. ( Hr. Tr. June 30, 1999, Vol. 1, p. 342).

64. Richard Vincent diagnosed Ms. Smith as having obsessive personality disorder. ( Hr. Tr. July 9, 1999, Vol. I, p. 8).

65. Mr. Vincent opined the following regarding whether Ms. Smith’s impairment substantially limits a major life activity:

Q. During the same period that you were treating with Ms. Smith, was her ability to interact with others appropriately, substantially restricted or impaired during that time frame?

A. Yes.

Q. What about her concentration, her ability to concentrate? **Do you feel or do you opine that her ability to concentrate was impaired substantially at the time that you were treating her?**

A. **I would like to kind of add a definition to the concentration. I think her mind to me was quite racy and her capacity to focus on one issue, so, in that way her concentration was impaired.**

Q. And the one issue being, whatever it was – Was it one specific issue that her mind concentrated on more so than others?

A. **Sometimes she would focus on one issue and elaborated on it extensively, and then sometimes she would be switching topics from one to another. It varied.**

Q. Is it your opinion that her sleeping was substantially impaired as a result of that diagnosis that she suffered?

A. **I believe she had insomnia, yes.** (Hr. Tr. June 30, 1999, pgs.342 - 343).

**Maureen David - Licensed Professional Mental Health Counselor**

66. Ms. Smith was admitted to the Pretera Center's AcuCare Program, a partial hospitalization program. This is an intensive outpatient treatment program where an individual receives group or individual treatment for several hours a day. ( Hr. Tr. June 30, 1999 Vol.1, p. 123).

67. On December 13, 1995, she was recommended to the program by Maureen David, a mental health counselor working as an emergency services clinician counselor at Pretera Center in Huntington. (Hr. Tr. June 30, 1999, Vol.1,pgs. 119-120).

68. Ms. David's educational background includes a Bachelor's degree in psychology and a Master's degree in counseling and rehabilitation from Marshall University. Vocationally, Ms. David had worked as an emergency service clinician whereby she would evaluate mental health patients on an emergency basis and refer those patients for hospitalization if it was necessary. (Hr. Tr. June 30, 1999, Vol. 1, p. 117).

69. When asked by Ms. Smith's counsel why she recommended Ms. Smith to this program, Maureen David responded that Ms. Smith had suicidal ideation with a plan on that day. . . . "She walked into the Center complaining of being very upset, having poor sleep, and erratic eating patterns, being fearful, anxious, feeling hopeless. She had thoughts of ending her life and not only a thought of it in general ending her life, she said that she had thought recently of a specific way of doing it . . . "that she lived on the Ohio River and that she would look at the river and just think, why. She didn't think she would ever really do it, but this is considered a plan." (Hr. Tr. June 30, 1999, Vol. 1, pgs. 119-120).

70. At the time Ms. Smith presented herself at Pretera, she was taking 20 milligrams of Prozac, an anti-depressant, twice daily. Although she had been given 15 tablets of Ativan, an anti-anxiety tranquilizer, to take four times daily in March of 1995, she had not taken any of them. (Hr. Tr. June 30, 1999, Vol. I, p. 121). Furthermore, Maureen David indicated that on the day she met with Ms. Smith, she observed depression and obsessive-compulsive traits in her. This opinion was based on Maureen David's experience of doing assessments, crisis intervention, working with substance abusers and working with chronically mentally ill homeless persons as a case manager. (Hr. Tr. June 30, 1999, Vol. I, pgs. 137-138).

71. On cross-examination, Ms. David testified that the cause of Ms. Smith's compulsion in her diagnosis was the "events that took place with her job and the related turmoil thereafter". (Hr. Tr. June 30, 1999, Vol. I, p. 132).

**Dr. Dennis Kojza - Clinical Psychologist**

72. Dennis Kojza, clinical psychologist, wrote a letter to the Division of Rehabilitation Services and another letter to JoAnn Turner, UPS, ECR Disability Unit. In the letter to the Division of Rehabilitation Services, Dr. Kojza wrote that Ms. Smith "has been in treatment as she has been suffering from depression. In addition, Ms. Smith has experienced anxiety associated with her tendency to think in a perfectionist and rigid manner." (Hr. Tr. June 30, 1999, Vol. I, Complainant's Exhibit No. 16).

73. In his letter to JoAnn Turner at UPS dated May 29, 1996, Dr. Dennis Kojza wrote that Ms. Smith was:

... discharged from our partial hospitalization program 2-12-96, following stabilization for her major depression. Although exhibiting a depressed mood and somewhat blunted affect, she was well oriented with memory or events intact and negative for hallucinations. She was logical, coherent, and goal directed. Due to her depressed mood, worrying and sleep disturbance, she was referred to Dr. Terry Lewis, M.A., in Pretera's Outpatient Department. ( Hr. Tr. June 30, 1999, Vol. I, Complainant's Exhibit No. 17).

**Dr. Teodoro Sablay- Psychiatrist**

74. On July 16, 1996, Dr. Teodoro Sablay sent a letter to JoAnn Turner at UPS on behalf of Ms. Smith in which he stated in his opinion that due to her personality style, she is likely to perform job duties which are organized and structured, such as those responsibilities that are required in warehouse work. He felt that she has a tendency to become obsessed with perfection and working to perform work

duties in a timely fashion and to the very best of her ability. While working as a truck driver for UPS, unexpected delays and other unorganized and unstructured obstacles prevented Ms. Smith from successfully completing requirements and caused much unmanageable stress and difficulty. This induced a great deal of psychological turmoil due to the above stated personality characteristics. Ms. Smith “is currently psychologically and physically capable of returning to work and should perform successfully in a work setting such as warehouse worker, where she has been placed before for a number of years.” (Hr. Tr. June 30, 1999, Vol. I, Complainant’s Exhibit No. 18).

**Faith Stewart- Therapist and Licensed Independent Clinical Social Worker**

75. Faith Stewart, an adult outpatient therapist and licensed independent clinical social worker at Pretera Center in Huntington, very credibly testified on August 30, 2001 before this ALJ as follows:

Q. When is the first time that you had an opportunity to counsel with Ms. Smith?

A. **November 6, 2000 . . . She was seen by a colleague of mine Katie Dawson, on October 13, 2000, so I had access to her intake papers.**

Q. And what is your recollection as to any history of emotional problems that was attained?

A. **She was extremely depressed. She had what I termed intense apathy, and apathy being she did not feel that she really control things in her own life, rather despondent. She had erratic sleep, she reported real intense insomnia. She had what we call psychomotor agitation, meaning she was so frustrated she moved around a lot.**

Q. Okay, what do you mean by erratic sleep?

- A. **She reported that she had problems going to sleep, that she would ruminate, she couldn't shut her mind down, she was worried about her problems and so forth. And then once she was asleep she would have what we call early morning awakenings, and that also is a sign of depression.** ( Hr. Tr. August 29, 2001, Vol. I., pgs.66-68).

76. When asked about the symptoms she observed in the counseling sessions she had with Ms. Smith, Faith Stewart testified further that:

- A. **She (Ms. Smith) had apathy.**
- Q. Which is what?
- A. **Where someone feels that no matter what they do, they can't control things around them. They get very despondent because they feel helpless and hopeless. She displayed a loss of interest in activities, again the insomnia, the erratic sleep, she was ruminating . . .**
- Q. What do you mean by ruminating?
- A. **Ruminating is where you can't shut off your mind. You think about something and you worry continuously about the problem. You say to yourself, well, I could have done this , I should have done that, maybe things would have been different, yeah. We call that ruminations.**
- Q. Okay, and continue with the symptoms.
- A. **She displayed anger and frustration with regard to past events in her life. She displayed hopelessness, she was isolating. The psychomotor agitation was intense. When she was in my office, she moved around quite a bit and we would touch on certain topics and her psychomotor agitation would get even more intense...(Hr. Tr. August 29, 2001, Vol. II., pgs.69-70).**
- Q. Did you have any opinions regarding whether Ms. Smith suffered from major depression or not . . . ?

- A. **My opinion was that she had what we call major depressive disorder recurrent and I rate it moderate...the depression comes and goes. People have periods of depression and then it subsides a little bit and then depending on what goes on in their life, the periods of depression may increase again.** (Hr. Tr. August 29, 2001, Vol. I., pg. 72).

77. Faith Stewart very credibly stated that Ms. Smith has schizoid traits and Obsessive Compulsive Disorder (OCD) traits. The schizoid traits caused Ms. Smith to be detached from social relationships and not interact well with people. ( Hr. Tr. August 29, 2001, Vol. I., p.73).

78. Faith Stewart opined that–

“Ms. Smith had a restricted range of expression of emotions with regard to interpersonal relationships; that she neither desired nor really enjoyed at this point close relationships; that she chose solitary activities; that she had little interest in sexual experiences; that she takes pleasure in few activities; that she lacks close friends and she shows a detachment or rather flattened affect.” ( Hr. Tr. August 29, 2001, Vol. I., p.74).

79. Faith Stewart opined that Ms. Smith suffers from a mental impairment called depression and schizoid traits. (Hr. Tr. August 29, 2001, Vol. I., p.75). Faith Stewart credibly testified that the major life activity of **work** is affected by the depression and the schizoid traits and that certain work environments would not be conducive to maintaining a decent quality of life for Ms. Smith. For example, any type job where the employer could not control antecedents, i.e. dealing directly with the public, traffic and dealing with any hostile environment. A person who did not have Ms. Smith’s diagnosis would be able to disregard or not take so personally or not cause such rumination and worry over the aforementioned antecedents. (Emphasis mine). (Hr. Tr. August 29, 2001, Vol. I., p.77).

80. Faith Stewart credibly opined that Ms. Smith’s schizoid traits affect her ability to interact with others . . . “I see a detachment from social relationships, that’s work relationships, even going to the

local grocery store.” (Hr Tr. August 29, 2001, Vol. I, p.85) . . . “**her ability to sleep is substantially restricted.**” (Emphasis mine). (Hr. Tr. August 29, 2001, Vol. I, p.86). She further opined with a reasonable degree of certainty that Patti Smith could perform physical work where she did not have to interact with people . This includes work such as moving boxes and unloading boxes on a truck or sorting boxes in a warehouse type setting. Id.

81. Upon a review of the job description of a package car driver, Faith Stewart stated unequivocally that Ms. Smith could not perform the duties of a package car driver.

Q. After reviewing the job description for a package car driver and based on your knowledge of Patti’s condition and the nature of major depressive disorder, do you find that she is capable of performing the responsibilities and tasks associated with that job?

A. **In my opinion, no.**

Q. And would you please explain your reasons for that opinion?

A. **See, hear and speak with sufficient capability to perform assigned tasks and maintain proper job safety conditions and communicate with the public.**

Q. Are you saying she would have problems with that?

A. **Yes, I do believe she would have problems with that.**

Q. And why do you feel she would have problems with that?

A. **Because of the nature of the signs and symptoms that I have seen within Patti. Because of the nature of her depression, the nature of what I see as schizoid traits and the OCD traits, I think she would have great difficulty doing that.** (Hr. Tr. August 29, 2001, Vol I., pgs.119-120).

Q. Ms. Stewart, have you had the opportunity to look at the job of loader / unloader?

A. **Yes.**

Q. And in your opinion is Patti Smith capable of performing that job?

A. **I would think so, yeah.**

Q. And why do you feel she can perform the job of a loader / unloader?

A. **Because it does not appear to contain as much contact with the public and in a particular to work—where was it, be able to work cooperatively in a diverse work environment.**

Q. So, it's your opinion that she is capable of performing jobs that do not require her to have contact with the public and ones that are structured, is that correct?

A. **Yes.**

Q. And its your professional opinion that she is not capable of performing the package car driver job because that would require her to have contact with the public?

A. **Yes, and there's so many numerous antecedents when one is out in the truck.**

Q. And those are antecedents, in your opinion, that she would not have control over, nor the employer, for that matter.

A. **Exactly, exactly.** ( Hr. Tr. August 29, 2001, Vol. I, pgs.121-123).

82. Faith Stewart's testimony regarding Ms. Smith's mental impairment and its effect on her major life activities of **sleep and work** (emphasis mine) is credible.

**Dr. John Justice - Psychiatrist**

83. At the October 19, 2001 hearing, UPS presented Dr. John Justice as an expert witness to render an opinion regarding the issue of whether Ms. Smith had a disability. Dr. Justice's opinion is based solely on a reading of Ms. Smith's medical records made available to him by UPS. ( Hr. Tr. October 19, 2001, Vol I, Respondent's Exhibit 10.)

84. Dr. Justice is Board Certified in Psychiatry and Forensic Psychiatry.

85. He did not personally meet with Ms. Smith.

86. Dr. Justice opined that Ms. Smith did not show evidence of a disabling psychiatric illness that would substantially limit a major life activity or restrict Ms. Smith from performing her previous occupation. (Hr. Tr. October 19, 2001, Vol. I, Respondent's Exhibit 10.) Dr. Justice's opinion is contrary to the overwhelming weight of medical evidence that supports a finding that Ms. Smith does suffer from a mental impairment and is impaired in the major life activities of **sleep** and **work**. (Emphasis mine).

87. Dr. Justice's testimony is not credible. It is obvious that UPS presented this medical testimony seven (7) years later only to try to overcome all of the medical evidence in favor of Ms. Smith.

**Dr. Jerome D. Massenburg - Psychiatrist**

88. At the October 31, 2001 hearing, Ms. Smith presented Dr. Jerome D. Massenburg as an expert witness to render an opinion regarding the issue of whether Ms. Smith had a mental impairment that affected her ability to perform a major life activity. Dr. Massenburg's opinion is based on a reading of Ms. Smith's medical records made available to him by Ms. Smith as well as an evaluation of her in his office on September 10, 2001. His opinion can be found in his report marked as complainant's Exhibit 10. ( Hr. Tr. October 31, 2001, Vol. I).

89. Dr. Massenburg opined that Ms. Smith manifests ongoing clinical depression with parallel difficulty coping with return to gainful employment and impaired personal and social functioning.

90. Furthermore, Dr. Massenburg stated in his report that Ms. Smith's mental impairment limited her in the major life activity for

... performing the essential job functions of a package care driver with UPS due to inability to sustain the capacity for proper job safety conditions because of vulnerability to fatigue and decreased concentration, impaired communication with the public, repetitive problems working in an environment with congested traffic and poor adjustment to inclement weather conditions. (Hr. Tr. October 31, 2001, Vol I., Complainant's Exhibit 10).

91. Dr. Massenburg's opinion corroborates the overwhelming weight of medical evidence that supports a finding that Ms. Smith does suffer from a mental impairment and is impaired in the major life activities of **sleep and work**. (Emphasis mine).

92. Dr. Massenburg's testimony is credible.

**Dr. Nina Smith - Gynecologist**

93. Dr. Smith performed a hysterectomy on Ms. Smith in late March of 1995 and released her to return to work from a gynecological stand point on May 2, 1995.

**Dr. Constance Hayden, Psychiatrist**

94. Dr. Hayden treated Ms. Smith in 1995. She saw Ms. Smith five times. During this time, Dr. Hayden diagnosed Ms. Smith as suffering from major depression and Obsessive Compulsive Disorder. (Hr. Tr. June 30, 1999, Vol. 1, pgs. 184-185, 338-339).

95. On May 3, 1995, Dr. Constance Hayden, then Ms. Smith's treating psychiatrist, sent a letter to UPS wherein she also requested a reasonable accommodation of reassignment to a position inside the warehouse. Dr. Hayden wrote:

I am the physician who has been following Pat Smith for an atypical depression following recent Ob-Gyn Surgery.

I feel it is in both the best interests of the employer, and Ms. Smith if she is **immediately reassigned to a position in which the duties do not include the operation of a vehicle (truck).**

**It is my strongest recommendation as a board-certified psychiatrist that she be restricted from driving a truck for at least six months. Feel free to contact me if questions remain.**

96. On November 3, 1995, Patti Smith went to the office of Dr. Constance Hayden. Ms. Smith wrote a note to Dr. Hayden that she wanted to be transferred to another physician at that same facility. Ms. Smith indicated that she did not have a good relationship with Dr. Hayden. Therefore, Ms. Smith severed the physician-patient relationship.

97. On November 15, 1995, Dr. Hayden improperly wrote a letter to UPS which returned Ms. Smith to a full-time driving position without sending a copy to Ms. Smith. Dr. Hayden wrote:

I discussed Pat's situation [with] Dr. Pritt: I am in agreement with him that she is capable of returning back to work. I had not seen Dr. Pritt's review as [Mr. Vincent] has already signed off on it. (Instead of the primary physician). I concur [with] Dr. Pritt that she is capable of going back to work. (Hr. Tr. July 9, 1999, Vol II, pgs. 153-154, Exhibits R, S;).

98. UPS then fired Ms. Smith and this caused her to be evaluated by Maurine David. Dr. Hayden's medical license has since been revoked.

**Dr. Kathleen O'Hanlon – Family Practitioner**

99. At the onset of her depression in March of 1994, Dr. O'Hanlon treated Ms. Smith.

100. Dr. O'Hanlon initially diagnosed Ms. Smith as having “moderately severe” depression and “ongoing job related” stress.

**Robert Williams –Rehabilitation Counselor**

101. Mr. Robert Williams, a rehabilitation counselor and employment counselor was called as an expert witness to testify as to the results of the vocational assessment he performed on Ms. Smith on July 24, 2001.

102. Mr. Williams very credibly opined that based on Dr. Humphreys' and Richard Vincent's psychiatric reports which assume that Ms. Smith has a significant psychiatric mental impairment that interferes with her working with other individuals, Ms. Smith is ineligible for about 22% - 25% of the jobs in the labor market. This is a substantial number of jobs that Ms. Smith is ineligible for and puts her under a vocational handicap. (Hr. Tr. August 29, 2001, Vol I., pgs. 278, 282, 307).

103. Mr. Williams reviewed the job descriptions of package car driver, loader / unloader and sorter and is of the opinion that Ms. Smith cannot function in a job where she would need to deal with the public. (Hr. Tr. August 29, 2001, Vol. I, p. 278).

104. Ms. Smith suffers from a mental impairment and not a physical impairment as UPS has asserted in its pleadings.

105. Ms. Smith has not worked for UPS since her requested return date of May 2, 1995.

106. Kevin Lawhorn was employed by BASF Corporation located in Huntington, West Virginia. He became the Human Resources Manager in 1999.

107. Mr. Lawhorn testified that the complainant was one of their best employees. (Hr. Tr. August 30, 2001, Vol II, p. 28). Moreover, the unrebutted testimony is that in her job as a chemical operator A or B, **she is never required to deal with the general public.** (Emphasis mine). (Hr. Tr. August 30, 2001, Vol. II, pgs. 28 - 29).

Q. As an Operator A or an Operator B, is Ms. Smith required to deal with the outside public?

A. **No, sir.**

Q. Not at all?

A. **No, sir.**

Q. Does she have to deal with variables, such as traffic, in her job as an Operator A or B?

A. **I'm not sure –**

Q. Outside traffic, cars on the highway, anything like that?

A. **No, sir.**

Q. Does she have to deal with variables such as weather or irate customers from the general public as an Operator A or B?

A. **Only weather could be sometimes in transporting maybe some drums from one building to another, rain, snow, cold, heat.**

Q. But that's within the plant and the area of the plant; is that correct?

A. **Yes, sir.**

Q. I mean, outside of the plant, does she even go outside of the plant during her job – into the general public?

A. **Oh, no, sir.**

108. Robert Rufus testified in the prior hearing as an expert witness, without objection, as an economist. Mr. Rufus stated that he employed twenty-five (25%) as the value of the benefits at BASF. The following testimony was elected during the cross examination of Robert Rufus.

Q. Okay, How about 25 percent of BASF? How did you come up with that?

A. **We did have a similar document from them, so I employed the Employee Benefit 1997 Edition Guide, which is published by the U.S. Chamber of Commerce Research Center, from a 1997 survey. Which says that employee benefits normally range from 22 to 33 percent. In this case, I employed 25 percent.** (Hr. Tr. July 9, 1999, Vol. II, p. 128).

This Administrative Law Judge agrees that 25% is the most reliable evidence regarding the value of the fringe benefits at BASF.

109. This Administrative Law Judge adopts complainant's Proposed Findings of Fact Nos 69 - 77 in response to the Commission's Remand Order dated May 15, 2001, regarding Ms. Smith's lost wages and lost fringe benefits due to discrimination. Ms. Smith did submit into evidence her tax returns as well as her earnings at BASF. These facts are uncontroverted by respondent UPS. (See attached as Commission's Exhibit Number 5).

110. According to the rates of pay presented by UPS in their "Skilled Rated Contract Year 1993-2001" Ms. Smith's total lost wages from May 2, 1995 through February 1, 2002, is \$224,064.16. Her actual earnings after May 2, 1995 through the year 2000 is \$169,066.56. The difference is a total lost wage of \$54, 997.60.

111. The value of benefits at UPS from May 1, 1995 through August 2001 is \$95,884.04. The value of fringe benefits at BASF for the period 1995 through 2001 is \$36,332.41. Therefore, the value of lost fringe benefits as of August 2001 is \$59,551.63.

112. The total lost wages and benefits through August 2001 is \$115,549.23.

113. Ms. Smith suffered a loss in benefits in the forms of health insurance and a pension plan.

At no time did UPS offer any evidence to show that the benefits of BASF were comparable to those of UPS. They were not raised and as cited repeatedly in West Virginia case law, the burden of raising the issue of mitigation is on the employer. Syllabus point 2, Mason County Board of Education v. State Superintendent of Schools, 170 W. Va. 632, 295 S.E.2d 719 (1982), West Virginia Dept. of Natural Resources v. Myers, 191 W. Va. 72 , 443 S.E.2d 229 (1994).

114. UPS argues that Robert Rufus, Ms. Smith's expert, testified that Ms. Smith's benefits at BASF were worth 25% of Complainant's wages at BASF. (See p. 2 of *Respondent's Objection to Complainant's Submission for Entitled Back Pay and Computations Employed in the Calculation* dated February 13, 2001).

115. Based on the credible evidence of record in this matter, the Ms. Smith lost wages should be calculated based on Article 20, Section 4 of the contract which provides that she should be paid the highest rate equivalent to someone part time or with that seniority.

116. In the UPS's *Objections to Complainant's Submission for Entitled Backpay and Computations Employed in the Calculation* submitted on February 13, 2001 to the ALJ, UPS argues that the Ms. Smith must be paid at the "pay for part-time employees". (See *Respondent's Objection to Complainant's Submission for Entitled Backpay and Computations Employed in the Calculation*, p. 2, paragraph 4).

117. Administrative Law Judge Dooley erroneously adopted the argument of UPS and did not grant Ms. Smith a monetary award of back-pay. Ms. Smith retains her full-time status as an employee,

but merely works in a job that is ordinarily a part-time job. The testimony of Ken Hall is instructive regarding the status of Ms. Smith and the male employees, Kenny Maynard and Jack Dent, who each received an accommodation.

JUDGE DOOLEY: Just a second. He's answered the question, but I didn't hear what he said. Now, the question was leading, but, you know, Mr. Staples, if you would watch that. What was your answer?

THE WITNESS: My answer is he was working two part-time shifts. **He's a full-time employee.** He's considered a full-time employee. **He's full time employee.** We bumped to – or was made accommodation to him, he was working two part-time shifts. **He is still considered, for the purposes of benefits and otherwise, he' considered a full-time employee.**

JUDGE DOOLEY: Okay. All right. (Tr. Vol. 11, p. 57).

118. Ken Hall affirms that Pat Smith is still a full-time employee who is working a part-time shift.

Q. I want to ask you something, sir, about the rate of pay. Now, Ms. Smith is considered – is she considered on May 2nd, '95, was she considered part time or full time?

A. **She was a full time employee.**

Q. If the Company had allowed her to come back on or about that date, what status would she have held if she had been allowed to come back and work two part-time jobs? Would she have been part-time or full-time?

A. **For the purpose of benefits, she would have been considered a full-time employee who was displaced – who was working two part-time positions, not necessarily displaced.**

Q. And what rate of pay, hourly rate of pay would she have earned as the highest rate of pay stipulated by the contract?

A. **The highest rate of pay for part-time was very close to a package driver. The language in Article 20, Section 4 provides that she be paid the highest rate equivalent to someone part-time or with that seniority.**

Q. Given that she was – given her years of service with the Company, I can tell you, but I’m not certain what the rate was then, but I believe now the rate would be approximately \$18 per hour. (Tr. Vol. 2, p. 60-61).

119. Furthermore, Judge Dooley is correct when she awards Ms. Smith attorney fees and costs.

120. Ms. Smith’s testimony before this ALJ regarding her mental impairment and request for reasonable accommodation as well as the discriminatory conduct of the respondent UPS is credible.

121. Ms. Smith was humiliated, embarrassed, and suffered emotional distress as a result of the unlawful discriminatory conduct by UPS toward her.

### **Answers to the Commission’s Questions on Remand**

**Question A:** Judge Dooley found that Ms. Smith is disabled. In order to meet this burden, Ms. Smith must show that she has a mental or physical impairment which substantially limits one or more of a person’s major life activities. In which major life activity is Ms. Smith substantially impaired?

**Answer to Question A:** Ms. Smith has the mental impairment known as depression. In addition to the depression, she suffers from schizoid traits, obsessive compulsive disorder, obsessive compulsive personality disorder with paranoia traits. She is substantially impaired in the major life activities of **work and sleep.** (Emphasis mine).

**Question B.** If the Administrative Law Judge finds that Ms. Smith is a person with a disability, then what is the connection between Ms. Smith’s “disability” and her ability to perform the essential functions of her job as a loader / unloader with Parcel Service?

**Answer to Question B.** Ms. Smith’s ability to perform the job as a loader / unloader is unaffected by her disability. However, Ms. Smith’s disability affects her ability to perform the essential functions of a package car driver as well as her ability to perform other jobs that involve interaction with

the public, driving in traffic and other unstructured jobs with variables beyond Ms. Smith's control.

**As to the Accommodation Issue:**

**Question A.** When and how did Ms. Smith ever request two part-time jobs as an accommodation? Was there any interactive process between Ms. Smith and the respondent?

**Answer to Question A.** Ms. Smith requested two part-time jobs from the respondent as an accommodation in a letter dated April 7, 1995 through her union representative, Ken Hall who is the President of the Teamsters Union for the area where Ms. Smith worked. ( Hr. Tr. August 29, 2002, Vol. I, pgs.140-141, and pgs.190,196).

There was an interactive process between Ms. Smith and the respondent. Ms. Smith is a member of the union that serves the employees in the South Charleston Hub. Ken Hall is the union representative who administers the union contract and processes grievances for the employees. ( Hr. Tr. June 30, 1999, Vol. I, p.190). He delivered a medical statement from Dr. Constance Hayden dated May 3, 1995 which stated that Mrs. Smith should be "immediately reassigned to a position which the duties do not include the operation of a vehicle". ( Hr. Tr. June 30, 1999, Vol. I, pgs.191-193). The respondent had requested a doctor's statement through its labor manager, Wade Caldwell as to whether Ms. Smith needed a non-driving job. ( Hr. Tr. June 30, 1999, Vol. I, p.192). Ken Hall continued to have numerous conversations with the respondent's representative regarding an accommodation and reassignment of work for Ms. Smith.

**Question B:** Why can Ms. Smith perform two part-time jobs better than one full time job? What are the essential functions of the two jobs?

**Answer to Question B:** Ms. Smith did not have enough seniority to bump any of the employees who had the few full time positions of loader / unloader, pre-sorter and sorter. Ms. Smith's only

option was to work two part-time shifts. ( Hr. Tr. August 29,1999, Vol I, p.199). The duties of a loader/unloader is attached as Exhibit 3. The duties of a pre-sorter/sorter is attached as Commission's Exhibit 4.

**Question C:** As to Ms. Smith's present position as a chemical operator, what are the duties of that position? How does it differ significantly from the position Ms. Smith held with UPS?

**Answer to Question C:** When Ms. Smith worked for BASF, she worked the late night shift. There were not very many people involved. ( Hr. Tr. August 29,1999, Vol I, p. 288). This job did not require Ms. Smith to interact with people, nor did it require her to drive a vehicle. ( Hr. Tr. July 9, 1999, Vol II, pgs. 102 - 103). She worked inside a control room where she transferred a batch of material from one tank to another. She operated the controls of the chemicals with gauges and dials. Sometimes, she took samples. ( Hr. Tr. August 29,1999, Vol. I p. 289). The job as a chemical operator differed significantly from that of a UPS package car driver in the following ways:

**Chemical Operator**

1. No driving required.
2. No interaction with the public.
3. Controlled environment.

**Package Car Driver**

1. Extensive driving along public streets in a variety of traffic.
2. Daily interaction with the public throughout the work day.
- 3 Many variables beyond Ms. Smith's control

When asked about her job as a chemical operator, Ms. Smith described her responsibilities as follows:

- Q. Now, you are currently employed and have been for some time as a chemical operator?

A. Yes.

Q. What do you do as a chemical operator?

A. A or B?

Q. A. We'll start out with A and go to B.

A. **Well, I'm a sulfinator. I work on the sulfinators and it's just the process where a B Operator grinds hard opal into a sulfinator. It's a vessel, it's just a tank and it heats it and cools it and heats it and cools it and then you blow that into a wash tank and you do this from a panel inside a control room where there's maybe three other people in there with me, and, of course, they're doing their own things and it's semi-automatic and you blow that into a wash tank, it sets in the wash tank, washes out, you have to go check the pH, it has to be a certain pH before you can move it into the dissolve tank. You move it into the dissolve tank, it sets in that dissolve tank, it does its process. You send it to a hold tank, then you send it into the precipitation tank. It's just a process of moving from--transferring this batch of stuff from one tank to another and it's the same process over and over and over and over.**

Q. Do you have to deal with the public at all in this job?

A. **No public, you are inside a control room, I'm on the midnight shift, there is hardly anyone around.**

Q. Is that different ma'am, significantly different to you as a package car driver with United--

A. **Oh, you can't compare them, they're oranges and apples, I mean there is no comparison. I mean it's a very structured job and it's exactly-- (I was just God) blessed to have gotten it because it was exactly what the doctor ordered. I mean, it really is, you know, a very structured job.**

**QUESTION III:** The Administrative Law Judge chose July 10, 1999 as the date from which to calculate back wages. What does Ms. Smith believe is more appropriate?

**ANSWER TO QUESTION III:** May 2, 1995.( Hr. Tr. August 30, 2001, Vol II, p. 99).

Ms. Smith's gynecologist, Dr. Nina Smith, released her to return to work on May 2, 1995. ( Hr. Tr. August 30, 2001, Vol II, p.79). Ms. Smith was ready to return to work on May 2, 1995, but could not because UPS had not made an accommodation for her, i.e., permitting her to come back to work as a loader/unloader. She submitted a letter dated May 3, 1995 from her treating psychiatrist, Dr. Hayden. In the letter, Dr. Hayden indicated that Ms. Smith suffered from atypical depression and should be restricted from driving a truck for six months. (See Commission's Exhibit 3). Dr. Hayden requested an accommodation. On May 3, 1995, Ms. Smith also filed a complaint with the Teamsters Local 175 against the respondent alleging that UPS failed to make an accommodation for her. In that complaint, Ms. Smith asked for eight hours of work. (See Commission's Exhibit 4). Judge Dooley felt that July 10, 1999 was the correct date because that was the hearing date when Ms. Smith stated specifically that she would take two part time jobs. UPS agrees with Judge Dooley. However, Ken Hall testified at the July 10, 1999 hearing that in May and June 1995 he discussed Patti Smith's desire to return to work either full time or with eight hours of inside work numerous times with then labor manager Wade Caldwell. Also, prior to July 10, 1999, Ken Hall had the letter from Richard Vincent dated April 7, 1995 and the May 3, 1995 letter from Dr. Hayden, both of which he presented to Wade Caldwell, but was not able to get anywhere. Ken Hall asked Ms. Smith to file a grievance which she did do on May 3, 1995. A grievance meeting was held on May 8, 1995. At the August 29, 2001 hearing when asked if he, Ken Hall, at any point in time requested two part-time jobs as an accommodation for Patti Smith, he responded "We requested inside work. We talked about all sorts of possibilities, including two part-time shifts." ( Hr. Tr. August 29, 2001, Vol I, p.196). . . . "

Therefore, I'm clear, that the only way you could create eight hours work inside that building, is to have two part-time shifts." (Hr. Tr. August 29, 2001, Vol I, p. 197). I find Ken Hall's testimony on the issue of whether Ms. Smith requested two part-time jobs that would give her eight hours of work daily to be credible. When Ms. Smith talked to Ken Hall as far back as March, 1995, she knew that her only option was two part-time jobs. Id. p 81. On June 16, 2002, Ms. Smith participated in a meeting where there was discussion about accommodating her with two part-time jobs. Id. p. 82.

I find Patti Smith's testimony credible. **Judge Dooley was incorrect when she established the date July 10, 1999 from which to calculate damages. The date is May 2, 1995.** (Emphasis mine).

**QUESTION III: B.:** Why were the incidental damages increased from \$1000.00 the date of the first order to \$1600.00 in the supplemental order?

**ANSWERTO QUESTION III. B.** Judge Dooley does not give a rationale in her two orders. However, the amounts are incorrect in each order. The Commission awards a set figure of \$3,277.45 in incidental damages. The Commission does not prorate the amount of incidental damages. Therefore, the amount awarded to Ms. Smith is \$3,277.45. Judge Dooley's decision should be amended to reflect that the amount of incidental damages awarded to Ms. Smith is \$3,277.45.

### **Post-hearing Motions**

C. The Commission directed the Executive Director to have an ALJ on staff to . . . **"rule on all post-hearing motions that are part of this case."** (Emphasis added).

Ms. Smith filed an Appeal of Administrative Law Judge Dooley's Final Decision, an Integrated and Amended Notice of Appeal Regarding Final Decision and Supplemental Order of Administrative Law Judge and Notice of Ms. Smith's Appeal Regarding Back Wages, Fringe Benefits, Seniority and Return

to Work. UPS filed a Response in Opposition to Patti Smith's Appeal disagreeing with Judge Dooley's finding that Ms. Smith is disabled. This ALJ cannot rule on these motions. The Post-hearing motions are to be ruled on by the Commission itself.

This ALJ can, however, issue an order regarding the attorney fees because Judge Dooley awarded Ms. Smith attorney fees in her Supplemental Final Decision.

### C.

#### DISCUSSION

The undersigned adopts and incorporates in this Amended Final Decision in Response to Commission's Remand Order, the "Discussion" in Judge Dooley's January 10, 2001 Final Decision as it relates to the issue of liability and adds thereto the following:

The standard that the West Virginia Supreme Court applies when assessing whether an individual is "handicapped", can be found in Teets v. Eastern Associated Coal Corporation, Federal No. 2, \_\_\_ W. Va. \_\_\_, 421 S.E. 2d 46, (1992). The Court ruled that such an assessment is made on a case by case basis. The Court States:

The question of who is a handicapped person under the Act is best suited to a "case-by-case determination," E.E. Black, Ltd. v. Marshall, 497 F.Supp. 1088, 1100 (D. Hawaii 1980), as courts assess the effects of various impairments upon varied individuals. The definitional task cannot be accomplished merely through abstract lists and categories of impairments. The inquiry is, of necessity, an individualized one - whether the particular impairment constitutes for the particular person a significant barrier to employment...,

{T}he very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general

disadvantage in his or her search for satisfactory employment. Jasany v. United States Postal Service, 755 F.2d 1244 at 1249 { (6th Cir. 1985) }. (FN12).

Under the West Virginia Human Rights Act , “handicapped” and “disability” are used interchangeably.

Also, the West Virginia Supreme Court has ruled that under the West Virginia Human Rights Act, a temporary condition is covered as a disability. Haynes v. Rhone-Poulenc, Inc., \_\_\_\_ W. Va. \_\_\_\_, 521 S.E. 2d 331 (1999). The Court stated:

Based on the foregoing reasoning and authorities, we hold that a “qualified disabled person” is protected by the West Virginia Human Rights Act, W. Va. Code, 5-1-1 et. seq. And regulations issued pursuant thereto, **includes a person who has a disability and is temporarily unable to perform the requirements of the person’s job due to their disability, with or without accommodation.** We also hold that under the West Virginia Human Rights Act, W. Va. Code 5-11-1 et. seq. , required reasonable accommodation may include a temporary leave of absence that does not impose an undue hardship upon an employer, for the purpose of recovery from or improvement of the disabling condition that gives rise to an employee’s temporary inability to perform the requirements of his or her job. See footnote 17.

The West Virginia Human Rights Commission’s Rules Regarding Discrimination Against Individuals With Disabilities defines a “mental impairment” to mean any mental or physiological disorder such as emotional illness. The EEOC Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities list major depression, obsessive compulsive disorder and personality disorders as examples of mental impairments. The overwhelming medical evidence supports a finding that Ms. Smith suffers from major depression, obsessive compulsive disorder and personality disorder. Clearly, Ms. Smith

has a mental impairment and the preponderance of the evidence supports a finding that she is substantially limited in the major life activities of work and sleep.

UPS argues that Ms. Smith is not substantially limited in any major life activity and that she has simply grown to dislike her job – with the traffic jams, the bad weather and people complaining about how she parks her truck.

For example, UPS relies on parts of Dr. David Humphreys' testimony at the hearing to the effect that Ms. Smith can perform the role of package car operator. But Dr. Humphreys goes on to say that when you combine operating a motor vehicle with the task of meeting the public and all the demands of the workday for as much as 9.5 hours a day, Ms. Smith cannot perform the role of package car driver.

UPS also relies on Dr. John Justice's testimony at the October 19, 2001 hearing during which time he testified that, in his opinion, Ms. Smith did not have a mental impairment. But Dr. Justice's opinion is based on a review of the medical records only. He never had Ms. Smith in his office for an assessment as did Dr. Massenburg.

In addition, Dr. Justice's opinion is being offered some seven years later to rebut the overwhelming medical opinions of the numerous psychiatrists and therapists who treated Ms. Smith throughout the seven years and who have found her to be substantially impaired in the life activities of work and sleep.

Furthermore, UPS relies on Dr. Pritt's observations of Ms. Smith: alert and oriented; had good personal hygiene; had good eye contact, had a broad and appropriate affect; had no flight of ideas; had no looseness of associations; had no hallucinations; had no delusions or paranoia; had no suicidal or homicidal ideation; and exercised appropriate judgment. He also opined that Ms. Smith's memory and concentration were intact. *Ex. L.* Indeed, he gave Ms. Smith a Global Assessment of Functioning score of 70-75,

indicating no significant impairment of social and occupational functioning (Hr. Tr. October 19, 2001, p. 33). But this constitutes select portions of Dr. Pritt's report and not the report in its entirety.

According to UPS, Ms. Smith's October 14, 1996 self-assessment also underscores her normal level of mental and physical functioning relevant to this proceeding .

- *I work well with my hands; I enjoy physical work.*
- *I work out all the time and am in very good physical condition.*
- *Mentally I feel stable as long as I don't put myself in upsetting conditions.*
- *Cognitively I'm always thinking ahead and planning for the next few days.*
- *I like routine and keeping things kept up & in order.*
- *I do well at following directions & instructions.*

UPS also referred to Dr. Humphreys' report in 1998 that Ms. Smith's depression was in remission and Dr. O'Hanlon's report of January 2001 that Ms. Smith's condition was controlled and her mood was reportedly good.

What UPS does not say is that Ms. Smith has not driven a UPS package truck since she went out on sick leave for a hysterectomy in 1995 and that she has not been subjected to the variables on the job that cause and accelerate her mental impairment. Furthermore, the activities that she describes in her testimony are solitary activities, *i.e.* working out at the YMCA; riding her bike; caring for her animals; cleaning her home; doing her laundry; etc. (Hr. Tr. August 29, 2001, Vol 1, pp. 243-251, 257-259).

## **Reasonable Accommodation**

Reassignment to another position is a reasonable accommodation. Title 77 of the Legislative Rules of the Human Rights Commission at Section 4.5.2 define “reasonable accommodation” to include reassignment.

4.5.2 Job restructuring, part-time or modified work schedules, **reassignment to a vacant position for which the person is able and competent (as defined in Section 4.3) to perform**, acquisition or modification of equipment or devices, the provision of readers or interpreters, and similar actions.

UPS takes the position that it is not bound by the Commission’s Interpretive Rules Governing Handicap Discrimination because the rules became effective May 19, 1994. This position is not correct. The West Virginia Supreme Court in Skaggs v. Elk Run Coal Co., Inc., \_\_\_\_ W. Va. \_\_\_\_, 479 S.E.2d 561 (1996) explained that the regulations changed in May 1994.

ALJ Dooley in her Final Decision correctly decided that the respondent had a duty to accommodate Ms. Smith and she carefully explains why.

A number of things happened to lead to a different result in Skaggs; :the Legislature amended the Human Rights Act to define disability to bring the law into line with the federal authorities. Subsequently, too, Congress enacted the ADA, which specifically defines “reasonable accommodation” to include “reassignment to a vacant position”. ADA, §202(9)(B), 42 U.S.C. § 12111(9)(B); see also, 29 C.F.R. § 1630.2(o)(2)(ii) (1995) [and, ...the Commission issued new Interpretive Rules Governing Handicap Discrimination, effective **May 19, 1994**, which provide: “Reasonable accommodations include, but are not limited to[,],... reassignment to a vacant position for which the person is able and competent ...to perform[.]” 77 W. Va. C.S.R. 1. § 4.5. Thus reasonable accommodation can include reassignment to a vacant position.

As the defendant rightly points out, however, the requirements we put in force today were not part of the West Virginia law at the time these employment decision were made. In addition to Coffman's holding that there was not duty to consider and make available positions other than the one the plaintiff had at the time of his discharge, the Commission's rules that were in effect in 1991 **and that remained in effect until May 1994** specifically excluded transfer to an open position as a possible accommodation that could be required by the Human Rights Act. Under the circumstances, we are compelled to agree with the defendant that reversal based on a revised interpretation of the reasonable accommodation duty would be inappropriate. To apply our new ruling retroactively in this case would be unfair and would punish the defendant for what may have been an attempt to comply with the law as it existed at the time of the plaintiff's discharge. Therefore, we hold that the ruling in this case will apply prospectively only.

The facts in Skaggs, supra, decision occurred from 1982 (Date of hire) through 1991. The accommodation requested in the present case occurred in May of 1995, **one year after the effective date** of the Interpretive Rules requiring reassignment. Accordingly, the employer was required by West Virginia law to reassign Ms. Scott.

Moreover, in Skaggs v. Elk Run Coal Co., Inc., \_\_\_\_ W. Va. \_\_\_\_, 479 S. E. 2d 561, (1996), the West Virginia Supreme Court determined that reasonable accommodations can include reassignment to a vacant position. Federal circuits adhere to the position that reassignment is a reasonable accommodation. (Giles v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996) and Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995).

The Court states,

To state claim for breach of the duty to make reasonable accommodation under the Human Rights Act, plaintiff may prove the following elements: Plaintiff is a qualified person with a disability; employer was aware of plaintiff's disability; plaintiff required accommodation in order to perform essential functions of job; reasonable accommodation existed that would

meet plaintiff's needs; employer knew or should have known of plaintiff's needs and accommodations and employer failed to provide accommodation. Code, 5-11-9.

UPS knew that Ms. Smith had a disability because the company was notified by her treating psychiatrists and was informed by Ken Hall. Ms. Smith needed to be reassigned to work in a structured environment such as in the warehouse. She could not perform the job as a package car driver. Ken Hall presented evidence that there were part-time jobs available that Ms. Smith could do. She had previously worked the jobs of loader, unloader and sorter / pre-sorter in the warehouse. Furthermore, Ken Hall pointed out to UPS that it had made accommodations in the past to three male employees who were package car drivers and because of physical impairments were reassigned to the warehouse.

Moreover, the court in Skaggs, supra states that the "employer should inform employees of potential job opportunities within the company and, if requested, consider transferring her to fill the opening." Id. At 564.

Finally, the Court determined:

Where an employer can accommodate a disabled individual without undue burden, the refusal to make necessary accommodations can become unreasonable and discriminating. Id. At 577.

### **Back Pay Awards**

Once a complainant establishes by a preponderance of the evidence that unlawful discriminatory employment action has occurred, she is entitled to an award of back pay. Frank's Shoe Store v. WV Human Rights Commission, 365 S.E. 2d 251 (1986).

The purpose of back pay awards is to make the victim of discrimination whole. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Hensley v. WV Dept. of Health and Human Resources, 456 S.E.2d

616 (1975); Griben v. Kirk, 466 S.E.2d 147 (1995). To obtain an award of back pay in a case before the Commission, Ms. Smith has the burden of proving the extent and the amount of the economic loss she suffered as a result the employer's unlawful conduct. Frank's Shoe Store, supra.

The measure of a back pay award is the difference between Ms. Smith's actual earnings for the period in question and those which she would have earned absent the discrimination. Gotthardt v. Nat'l R. R. Passenger Corp., 191 F.3d 1148 (9<sup>th</sup> Cir. 1999).

Ms. Smith has established by a preponderance of the evidence that she suffers from a mental disability that impairs her ability to function in the major life activities of work and sleep. Back pay awards reflect lost wages or salary and other benefits lost due to discrimination. EEOC v. Hacienda Hotel, 881 F.2d 1504, 1518, 50 FEP 877 (9<sup>th</sup> Cir. 1989). She is entitled to an award of back pay. The date that the back pay begins is May 2, 1995. This date is supported by the credible testimony of Ken Hall, the union representative who testified that there were part-time jobs available on May 2, 1995 when Ms. Smith requested reassignment.

An award of back pay is considered special damages and subject to prejudgement interest as a matter of right. Gribben, supra. An award of prejudgement interest is calculated as simple interest at the rate of ten per cent per annum in accordance with W. Va. Code § 56-6-31, Hensley, supra. Prejudgement interest on an award of back pay is calculated from the date the employee was discharged. Rodriguez v. Consolidated Coal Co., 524 S.E.2d 672 (W. Va. 1999).

Back-pay awards include such items of lost compensation as overtime, shift differentials, commissions, tips, cost of living increases, raises due to promotions, so long as those items are not speculative. See e.g., Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 145, (2<sup>d</sup> Cir. 1993); Long

v. Ringling Bros. - Barnum & Bailey, 9 F.3d 340, 343 (4th Cir. 1993); Crabtree v. Baptist Hosp. Of Gadsen, Inc., 749 F.2d 1501, (11th Cir. 1985); EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 755 (S.D. Fla. 1989); Willett v. Emory & Henry College, 427 F. Supp. 631 (W. D. Va. 1977), affd. 569 F.2d 212 (4th Cir. 1978).

Back pay also includes health insurance, dental care and 401K Plans as well as other insurance that Ms. Smith is legally entitled to recover.

### **Attorney Fees and Costs**

Like wise Ms. Smith, as the prevailing party, is entitled to attorney's fees and costs. The West Virginia Supreme Court in Aetna Casualty and Surety Co. v. Protolo, 176 W. Va. 190, 342 S.E.2d 156 (1986) and Brown v. Thompson, 192 W. Va. 412, 452 S.E.2d 728 (1994) set forth a twelve-factor test for determining reasonableness of attorney's fees. Those factors are: (1) The time and labor required; (2) the novelty and difficulty of the question presented; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee charged in similar cases; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and the length of the professional relationship with the client; and (12) awards in similar cases.

Counsel for Ms. Smith began their representation more than seven years ago. The issues in this case were complex and required a great deal of work by Ms. Smith's counsel. Even the Commission in its Remand Order indicated that this case was one of first of impression. The case was presented by Ms. Smith's counsel with extraordinary skill.

Judge Dooley ordered that Ms. Smith was entitled to \$30,432.50 in attorney fees and \$5,427.50 in costs for a total of \$35,860.35. Interim attorney fees of \$3,027.50 were incurred as a result of appeals filed by Ms. Smith and UPS. As a direct result of the Commission's Remand Order dated May 15, 2001, and three days of hearings, Ms. Smith incurred an additional \$39,427.39 in attorney fees and \$ 2,624.64 in costs for a grand total of \$67,235.00 in attorney fees and \$8,053.14 in costs.

A review of the hours claimed by Ms. Smith is what would be expected given the nature of Ms. Smith's disability, the length of time this case has been before the Commission, the fact that the case was remanded back by the Commission to another Administrative Law Judge for further development and three additional days of hearings.

Hourly rates previously awarded by the West Virginia Human Rights Commission have ranged from \$100.00 to \$300.00 per hour. The rate of \$175.00 per hour is well within the parameters of recent attorney fees awarded given the experience of Ms. Smith's attorney. The case was taken on a contingency basis and therefore, the case is not very desirable in light of the risk that no fee would have been recovered in prosecuting Ms. Smith's claim if she had lost. Public policy dictates that when Ms. Smith prevails, reasonable fees and costs are awarded so that private counsel is encouraged to prosecute actions seeking enforcement of the state's Human Rights Act. The attorney's fees and costs are reasonable in light of the seven years that the case has been before the Commission and in light of the fact that a three-day hearing was held as a result of the Commission's Remand Order asking for further development of the record. See Bishop Coal Co. v. Salyers, 181 W.Va. 71, 380 S.E.2d 238,249, (1989), Casteel v. Consolidated Coal Co., 181 W. Va. 501, 383 S.E.2d 305,312, (1989).

Incidental damages are awarded in human rights cases. Pearlman Realty Agency v. West Virginia Human Rights Commission, 239 S.E.2d 145 (1977). As a result of UPS's unlawful discriminatory conduct, Ms. Smith is entitled to an award of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity.

**D.**

**CONCLUSIONS OF LAW**

1. The complainant, Patti Smith is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the West Virginia Human Rights Act, W. Va. Code § 5-11-10.
2. The respondent, UPS, is a "person" and an "employer" as those terms are defined under W. Va. Code § 5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act.
3. The complaint in this matter was properly filed in accordance with W. Va. Code § 5-11-10.
4. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this section pursuant to W. Va. Code § 5-11-9 et seq.
5. The complainant is a member of a protected class in that she has a disability.
6. The complainant, Ms. Smith, has established by a preponderance of the evidence that she was discriminated against by the respondent United Parcel Service and that United Parcel Service failed to accommodate her disability.
7. As a result of the respondent's unlawful discriminatory conduct, complainant is entitled to an award for humiliation, embarrassment, emotional distress and loss of personal dignity.

8. As a result of the respondent's unlawful discriminatory conduct, complainant is entitled to reinstatement with an accommodation that will allow her to work inside respondent's place of business for eight hours per day at the rate of pay provided by relevant labor agreements.

9. As a result of the discriminatory action of the respondent, complainant is entitled to back pay and benefits from May 2, 1995, to the present, plus statutory interest at the rate of ten percent simple interest per annum, minus any earnings she would have received since that time from any source of employment.

10. The complainant, Ms. Smith, is entitled to reasonable attorney fees and costs.

**E.**

**RELIEF AND ORDER**

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondent, United Parcel Service shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of the receipt of the undersigned's Order, the respondent, United Parcel Service shall pay complainant Patti A. Smith reasonable attorney fees and costs incurred in the prosecution of this matter, in the amount of \$75, 288.14.

3. Within 31 days of receipt of the undersigned's order, the respondent, United Parcel Service shall pay the complainant Patti A. Smith incidental damages in the amount of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity plus statutory interest at the rate of ten percent per annum.

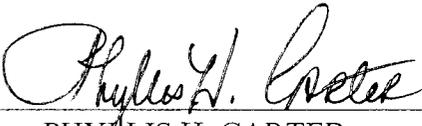
4. Within 31 days of the receipt of this Order the respondent, United Parcel Service shall pay the complainant, Ms. Smith, back pay in the amount of \$115,549.23, representing lost wages and benefits for the period of May 2, 1995 – August 2001 plus statutory interest at the rate of ten percent simple interest per annum. Complainant is directed to provide the undersigned ALJ with updated calculations for the period of September 2001 through January 1, 2003. Upon receipt of these calculations, a Supplemental Order will be issued reflecting the additional lost wages and benefits, statutory interest at the rate of ten percent simple interest per annum will attach to this amount.

5. In the event of failure of the respondent, United Parcel Service to perform any of the obligations hereinbefore set forth, complainant, Patti A. Smith is directed to immediately advise the West Virginia Human Rights Commission, Ivin B. Lee, Executive Director, 1321 Plaza East, Room 108-A, Charleston, West Virginia 23501-1400, Telephone: (304) 558-2616.

It is so **ORDERED**.

Entered this 23rd day of December 2002.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

BY:   
PHYLLIS H. CARTER  
ADMINISTRATIVE LAW JUDGE

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PATTI A. SMITH,

Complainant,

v.

Docket Number EH-57-98

UNITED PARCEL SERVICE

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was held on August 30<sup>1</sup> and July 9<sup>2</sup>, 1999, in Cabell County, at the City Council Chambers in Huntington, West Virginia, before Katherine L. Dooley, Administrative Law Judge.

The complainant, Patti A. Smith, appeared in person and by counsel, Dwight Staples of the law firm of Henderson, Henderson and Staples. The respondent, United Parcel Service, appeared by its representative, Jim Baier, and by its counsel, David J. McAllister and Christopher J. Soller of the law firm of Reed Smith Shaw & McClay, LLP., *pro hac vice*, and Kevin L. Carr of the law firm of Spilman, Thomas & Battle, PLLC.

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<sup>1</sup> Transcript references in this final decision from the June 30, 1999 testimony will be identified as Tr. 1.

<sup>2</sup> Transcript references in this final decision from the July 9, 1999 testimony, will be identified as Tr. 2.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and legal analysis of the administrative law judge are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

#### **A. FINDINGS OF FACT**

1. The complainant, Patti A. Smith, is a resident of Glenwood, West Virginia. She graduated from Morris Harvey College in 1981 with a bachelor's degree in psychology.
2. Ms. Smith began working for UPS as a loader/unloader in May 1980 at the South Charleston hub. She performed this job for approximately three years. (Tr.1, 154.) In the fall of 1983, Ms. Smith became a feeder-dispatcher. (Tr.1, 159.)
3. She- later moved in 1983 to the Huntington Hub as part time pre-load supervisor. She worked there almost three years. (Tr.1, 161-163.)
4. She returned to South Charleston in 1986 to accept the position of full-time package car driver. (Tr. 1, 162.)

5. The Respondent, United Parcel Service, Inc. is a corporation engaged in the business of package delivery. It's West Virginia business address is 3100 MacCorkle Avenue, South Charleston, West Virginia. (Tr. 2, p. 141.)
6. In September, 1994, Complainant had a work-related accident and suffered an injury. She attempted to return to work within a week of the accident, but was unable to. She was off of work for several months as a result.
7. Prior to her vehicle accident, Complainant testified that she was having problems with weight-loss, crying spells, depression, isolation, insomnia and fatigue which lead to absenteeism, conflicts with various people on her route and lack of concentration. (Tr. 1, 167-169.)
8. As early as March, 1994, Complainant was diagnosed with a possible history of depression by Kathleen O'Hanlon, M.D. of University Family Physicians. (Complainant Exhibit No. 1<sup>3</sup>.)
9. By December 1995, Ms. Smith was treated at the Accu-Care center at Prestera Center in Huntington. The program at Accu-Care consists of intensive out-patient therapy for people in emotional crisis and in need of immediate and intensive attention by mental health professionals. The program, in December 1995, was four hours a day, five days a week. (Tr.1, pg. 124.) Ms. Smith was released from the program on February 12, 1996. (Exhibit No. 17.)
10. When Complainant was released by the chiropractor treating her for the work-related injury, she was released to her gynecologist, Nina Smith, who was to perform a hysterectomy.

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<sup>3</sup>Complainant's Exhibits are identified by number.

11. Complainant was released to return to work by Dr. Smith on or about May 2, 1995. (Respondent's Exhibit A<sup>4</sup>.)
12. Richard Vincent, Ms. Smith's psychotherapist, in a letter dated April 7, 1995, indicated that she was suffering from Mood Disorder, Personality Disorder with obsessive traits. He recommended that she return to a structured work setting, "as opposed to a setting with variables (such as traffic congestion and dissatisfied customers) beyond her control." (Exhibit No. 3.)
13. Dr. Constance Hayden in a letter dated May 3, 1995 to the Respondent indicated that she had been treating Ms. Smith for atypical depression following her OB-Gyn surgery. She further indicated that she believed it in the best interests of the Respondent and the Claimant if Ms. Smith was "immediately reassigned to a position in which the duties do not include the operation of a vehicle (truck)." (Exhibit No. 5.)
14. Immediately following her release by Dr. Smith, the Complainant requested that UPS provide her with 8 hours work per day in a non-driving position. When UPS refused, she filed a complaint in accordance with the collective bargaining agreement.<sup>5</sup> (Exhibit No. 29.)
15. According to testimony at trial, there were but six inside full-time positions at the Charleston hub. Complainant did not have enough seniority to bump any of those individuals. (Tr.2, Pages 82-83, 173-174.)

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<sup>4</sup>Respondent's Exhibits are identified by letter.

<sup>5</sup>While the record contains extensive discussion about the complaint form and the grievance process used by the Complainant, this decision is not based on the collective bargaining agreement or any action taken pursuant to it. Reference is made to the complaint form only because it is a clear reference to a point in time when the Complainant requested the relief that is relevant to her claim with the West Virginia Human Rights Commission.

16. Complainant has not returned to her position as a package car driver at UPS.
17. In May 1996, Complainant began employment was a chemical operator at BASF Corporation in Huntington, West Virginia. (Tr.1, p. 274; Tr.2, p. 229.) That employment continues.

## **B. DISCUSSION**

The Respondent claims that the Complainant is not disabled under the West Virginia Human Rights Act and is, therefore, not entitled to its protection. In Syllabus Point 2 of *Skaggs v. Elk Run Coal Co.*, 198 W.Va. 51, 479 S.E.2d 561 (1996), the West Virginia Supreme Court of Appeals noted:

To state a claim for breach of the duty of reasonable accommodation under the West Virginia Human Rights Act, W.Va. Code §5-11-9 (1992), a plaintiff must allege the following elements: (1) The plaintiff is a qualified *person with a disability*; (2) the employer was aware of the plaintiff's disability; (3) the plaintiff required an accommodation in order to perform the essential functions of a job; (4) a reasonable accommodation existed that met the plaintiff's needs; (5) the employer knew or should have known of the plaintiff's need and of the accommodation; and (6) the employer failed to provide the accommodation. (Emphasis added.)

Thus, to have the status of being a "protected person" who can assert a claim for disability discrimination, a person must show that he is "a disabled person [or "person with a disability"]

within the meaning of the law.” *Skaggs v. Elk Run Coal Company*, 198 W.Va. 51, 71 n.22, 479 S.E.2d 561, 581 n.22 (1996).

Prior to 1989, our Human Rights Act statute prohibited employment discrimination against an “individual [who] is handicapped;” “handicap” was defined as “any physical or mental impairment which substantially limits one or more of an individual's major life activities.” *W.Va. Code* §5-11-3 and 9 [1981].

Based on this definitional language, in *Chico Dairy Co. v. W. Va. Human Rights Comm'n*, 181 W.Va. 238, 382 S.E.2d 75 (1989), we held that the Human Rights Commission did not have statutory authority to issue regulations that would give “protected person” status to bring a disability discrimination claim -- not only to persons with actual substantially limiting impairments (“actual disability” claims) -- but also to persons who did not actually have significantly limiting impairments, but who were regarded, perceived, or treated as having a disability (“regarded-as” claims).

In 1989, the definition of “disability” was amended by our Legislature to expand protected status to make a disability discrimination claim under our Human Rights Act to include not only persons who actually have substantially limiting impairments, but also to persons who have a record of such impairments or who are “regarded as” having such impairments. *W.Va. Code* §5-11-3(m) [1998].

The regulations implementing the Human Rights Act, *W.Va. Code of State Regulations* §77-1-2.8 [1994] further delineate the definition of “regarded as having an impairment” as meaning:

1. Has a physical or mental impairment that does not substantially limit major life activities but is treated by another as being such a limitation;
2. Has a physical or mental impairment that

substantially limits major life activities, only as a result of the attitudes of others toward such an impairment; or 3. *Has none of the impairments defined above but is treated by another as having such an impairment.* (Emphasis added)

This statutory and regulatory language provides a broader definition -- defining who may have protected status as a “person with a disability within the meaning of the law” who can assert a disability discrimination claim -- than the pre-1989 law did, including for the first time explicit protection for persons with “regarded-as” disabilities. *See Fourco Glass Co. v. W.Va. Human Rights Comm'n*, 181 W.Va. 432, 383 S.E.2d 64 (1989).

Applying the broader post-1989 definition, in *St. Peter v. Ampak-Division of Gatewood Products, Inc.*, 199 W.Va. 365, 484 S.E.2d 481 (1997) (*per curiam*), the West Virginia Supreme Court of Appeals rejected the argument that an employee who had injured his shoulder and needed to work a limited schedule because he would need physical therapy was not a protected person under the Human Rights Act, because he was allegedly not “actually limited” in a major life activity. Noting that the 1989 statute was “meant to change the law,” the court held that the employee, who was fired after his employer said that he was “half a man,” could invoke the protection of the Human Rights Act with a “regarded as” disabled claim, without proving that he actually had a substantially limiting impairment. 199 W.Va. at 370, 484 S.E.2d at 486.

Thus, West Virginia law, in terms of whether a person is a person with a disability within the meaning of the law, who has standing to assert a claim under our disability discrimination law, has gone from a narrower definition to a broader definition. And under both definitions, whether a person is a “person with a disability within the meaning of the law” is ordinarily an issue of fact for a properly instructed jury or other fact-finder applying the appropriate definitional test set forth in

the statute and implementing regulations. *Strawderman v. Creative Label Co., Inc.*, 203 W.Va. 428, 508 S.E.2d 365 (1998) (*per curiam*) (under post-1989 law whether a person with a migraine had an impairment that qualifies as an actual disability was to be determined by the trier of fact); *Teets v. Eastern Associated Coal Corp., Federal No. 2*, 187 W.Va. 663, 421 S.E.2d 46 (1992) (*per curiam*) (under pre-1989-law it was a jury question whether a woman's impairments substantially limited her in her employment.)

West Virginia Code §5-11-9(1) (1998) provides “It shall be an unlawful discriminatory practice... for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is ... disabled.”

A disability is defined as “mental or physical impairment which substantially limits one or more of such person’s major life activities.” West Virginia Code §5-11-3(m)(1)(1998)

The Respondent cites several cases arising under the federal laws against disability discrimination as authority for the proposition that Ms. Smith did not provide adequate evidence upon which this Court could conclude that she was a “person with a disability within the meaning of the law due to her diagnosis of Depression.

The West Virginia Supreme Court in the recent decision of *Stone v. St. Joseph’s Hospital of Parkersburg*, Slip Opinion No. 26962, Decided July 14, 2000, noted that:

[B]ecause of the similarity of the language in our Human Rights Act and related regulations and the federal laws and regulations that prohibit disability discrimination, has on occasion looked to decisions made under those federal laws to assist us in interpreting and applying our own law. *See, e.g., Haynes v. Rhone-Poulenc*, 206 W.Va. 18, 29 n.14, 32, 521 S.E.2d 331, 342 n.14 (1999) (stating that

the 1989 expansion of the definition of disability was done “to bring the law into line with the federal authorities.”)

However, in recent years a number of commentators on disability discrimination jurisprudence in the federal court arena have noted the development of a “startlingly diverse” body of federal case law, particularly in the “protected person” or standing area.

In *Stone*, as here, the Respondent has cited several federal disability discrimination case to support its proposition that the Complainant “did not as a matter of law submit sufficient evidence to permit a jury to find that he had standing or protected status as a “person with a disability within the meaning of the law” so as to claim the protection of our Human Rights Act -- and because our cases to date have looked at federal case law in the disability discrimination area in only a brief fashion” *Id.*

Justice Starcher noted in *Stone* that:

“...[I]t should be remembered that if a person is prohibited from establishing threshold “protected status” as a person with a disability within the meaning of the law, an employer may inflict any sort of (otherwise legal) discriminatory conditions or acts on the person -- no matter how unfair, arbitrary, stereotyped, bigoted, or unrelated to business necessity that those acts or conditions may be -- and the person will have no standing to complain of or remedy the discrimination. And it should also be remembered that establishing the “protected person” status of being a “person with a disability within the meaning of the law,” who has standing to make a claim, in no way guarantees that a claim of disability discrimination will succeed. All other elements of a claim, such as a discriminatory adverse employment action, qualification to do the job, lack of reasonable accommodation, etc., must be shown before a person is entitled to any relief.” *Id.*

Based on the “turmoil and diversity” of federal jurisprudence in the area of disability discrimination, Justice Starcher noted that the West Virginia Human Rights Act, as created by the Legislature and as applied by the Courts of this State and administrative agencies, represents an

independent approach to the law of disability discrimination that is not mechanically tied to federal disability discrimination jurisprudence. *Id.*

The Respondent argues that the Complainant cannot meet that definition of “disability” under W.Va. Code §5-11-9(1)(1998) in that she does not have a “mental or physical impairment which substantially limits one or more of such person’s major life activities. The Respondent claims that a diagnosis of Depression or even Major Depression in Remission is not a disability. For this proposition it cited cases from various federal cases. This claim is without merit.

In footnote 18 of *Stone*, the Court quoting a commentator on restrictions on the term “ ‘disability’\_imposed in the name of reserving the protection of the statute for “the truly disabled,” have caught many plaintiffs with serious, highly disabling conditions in their webs. The exclusion-from-one-job-is-not- enough formula has resulted in, or contributed to, the dismissal of ADA or section 504 of the Rehabilitation Act claims by plaintiffs with, among others, the following kinds of impairments: replacement of hips and shoulders (as a result of avascular necrosis); diabetes; cancer; laryngectomy (removal of larynx); hemophilia; heart attack; absence of one eye; degenerative hip disease resulting in a limp; permanent severe limitations in use of the right arm and shoulder; various serious back injuries; depression and paranoia; a six-inch scar on the face resulting in supervisors calling the employee “scarface;” “bilateral carpal tunnel syndrome;” asthma; asbestosis; HIV infection; traumatic brain injury resulting in vision limitations, memory deficiencies, problems with verbal fluency, problems abstracting and motor deficits; and stroke resulting in the loss of use of the left hand, arm and leg....”

*Stone* at fn. 18.

Because as a matter of law the undersigned finds that the Complainant has a disability, the inquiry must now turn to whether with a reasonable accommodation she would be able and competent to perform the essential functions of the package car driver job.

In *Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 479 S.E. 2d 561 (1996) the Court noted that after its decision in *Coffman v. West Virginia Bd. of Regents*, 182 W.Va. 73, 386 S.E. 2. 1 which held that, “the duty to reasonably accommodate only contemplates accommodation of a qualified employee’s present position. [I]t does not include a requirement to reassign or transfer an employee to another position.”

A number of things happened to lead to a different result in *Skaggs*: “the Legislature amended the Human Rights Act to define disability to bring the law into line with the federal authorities. Subsequently, too, Congress enacted the ADA, which specifically defines "reasonable accommodation" to include "reassignment to a vacant position." ADA, § 101(9)(B), 42 U.S.C. § 12111(9)(B); see also 29 C.F.R. § 1630.2(o)(2)(ii) (1995)[and,... the Commission issued new Interpretive Rules Governing Handicap Discrimination, effective May 19,1994, which provide: "Reasonable accommodations include, but are not limited to[,] . . . reassignment to a vacant position for which the person is able and competent . . . to perform[.]" 77 W. Va. C.S.R. 1, § 4.5. Thus, reasonable accommodation can include reassignment to a vacant position. However, this does imply that an employer must create a make-work job or retain someone it does not need. An employer should assess the extent of an employee's disability and how it can be accommodated. If the employee cannot be accommodated in his or her current position, however it is restructured, then the employer should inform the worker of potential job opportunities within the company and, if requested, consider transferring him or her to fill the opening. See *Curtis v. Security Bank of Washington*, 69 Wash. App. 12, 847 P.2d 507, 512, review denied 121 Wash. 2d 1031, 856 P.2d 383 (1993). Of course, for many employers, especially those with small workforces, there simply may not be any openings of sufficient flexibility to make use of a particular employee. If that is the case,

the employer would be justified in releasing the employee. In any instance, the employer must have a reason for refusing a proposed accommodation that would permit the impaired worker's continued employment.

Accordingly, the discussion must now turn to whether an accommodation was needed. There is more than sufficient evidence on the record for a conclusion that Complainant's medical providers believed that her psychological problems were in some way related to her job as a package car driver. Without question, the Complainant believed that the pressures attendant to the position resulted in her severe bout of depression.

When Complainant was released to return to work following her hysterectomy, she requested an accommodation. The accommodation requested was for full-time (8-hour) inside work at UPS.

UPS has many part time jobs at it's South Charleston hub. These positions include preloader, sorter, and other duties. Prior to the 1997 contract, part time employees of UPS were guaranteed 3 hours of work per day. Following the 1997 contract, part time workers were guaranteed 3.5 hours of work per day. There is no real overlap in each of the shifts of part time workers at UPS with about two to two and half hours between shifts, except at peak times such as Christmas.

The president of Ms. Smith's union, Ken Hall, testified that there were full-time inside jobs at the UPS hub, but that the Complainant lacked the seniority which would have allowed her to bump or displace other individuals in those full-time positions. Apparently, according to the testimony of Mr. Hall, Ms. Smith did not want to work two part-time jobs at the South Charleston Hub. Because of the lapse in time between the shifts, she would be required to drive some distance to her house near Huntington and then return to South Charleston for a second shift.

At the public hearing in this case, for the first time, Complainant indicated that she would be willing to accept two part-time jobs at the South Charleston hub.

According to Mr. Hall, UPS never offered the Complainant two part-time jobs at its South Charleston hub.

UPS had apparently made accommodations for other workers considered disabled. One, Jack Dent, had rotator cuff surgery rendering him unable to perform his normal duties as a package driver. He was given a job as a car washer and other duties inside. It is the understanding of the undersigned that Mr. Dent worked 8 hours straight. Additionally, Kenny Maynard who was disqualified from driving due to Department of Transportation restrictions was given two part-time jobs in the Charleston hub.

UPS has consistently told complainant that her full-time position as a package car driver is available. According to Mr. Hall, at one point a part-time job was offered, but that offer was withdrawn. While, Ms. Smith had worked inside for UPS previously, there was no offer of a job inside to which she could have responded.

UPS argues that Ms. Smith was capable of doing the package car driver job.

The complainant here proved that she fit within the statute's threshold "protected person" requirement by proving that she was a qualified person with a disability, depression, that the employer was aware of her disability; and that she required a reasonable accommodation. Our analysis must now turn to whether a reasonable accommodation existed that met Complainant's needs while not constituting a burden to her employer. Here, the actions of both the Respondent and

Complainant were less than appropriate. Ms. Smith insisted that she be provided a full-time "inside" job at UPS. Although, the evidence revealed that one employee provided an accommodation at the South Charleston hub was required to drive a vehicle to the airport to pick up packages, Ms. Smith refused to drive, even on a limited basis.

The Respondent, early on, offered the Complainant a part-time job at the hub; she refused insisting that UPS provide her with a full-time job. Later, UPS withdrew its offer of a part-time job to Ms. Smith.

The most apparent accommodation for the Complainant was to provide her with two part-time jobs at the hub. By her own testimony, this was neither requested nor desired by the Complainant. However, at the time of the hearing the complainant indicated that she would accept two part jobs at the hub. Consequently, because this accommodation appears to be reasonable and without undue hardship for the respondent this relief will be ordered.

### **C. CONCLUSIONS OF LAW**

1. The Complainant, Patti Smith, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the West Virginia Human Rights Act, West Virginia Code §5-11-10.
2. The Respondent, United Parcel Service and was at all times relevant hereto, an employer as defined by West Virginia Code §5-11-3(a), and is therefore subject to the provisions of the West

Virginia Human Rights Act and the jurisdiction of the West Virginia Human Rights Commission.

3. The complaint in this matter was properly and timely filed in accordance with West Virginia Code §5-11-10.

4. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to West Virginia Code §5-11-9 *et seq.*

5. The Complainant is a member of a protect class in that she has a disability.

6. The Complainant established by a preponderance of the evidence that the Respondent failed to accommodate her disability by providing her work inside the hub.

7. As a result of the unlawful discriminatory action of the respondent the complainant is entitled to back pay from July 10, 1999 to the present time, plus statutory interest reduced by any earnings which she received since that time from any source of employment. Counsel for the complainant shall file and serve upon counsel for the respondent within two weeks of receipt of this order a calculation of the back pay award based on complainant's time and service to UPS and pay for part time employees as well as the earnings of complainant from BASF. Respondent's counsel shall have two weeks from the date of receipt of the back pay calculations to file objections additional information with the undersigned.

8. As a result of the Respondent's the Complainant is entitled to an award of incidental damages in the amount of \$1000.00 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

9. As a result of the unlawful discriminatory action of the Respondent, the complainant is entitled to an award of reasonable attorney's fees and costs of an aggregate amount to be determined by the undersigned. Within two weeks from this date of receipt of this decision, complainant's counsel shall file and serve upon counsel for Respondent a fee petition and accounting of time and costs incurred. Respondent's counsel shall have two weeks from receipt of the fee petition and accounting thereof, in which to file and serve any objections or responses thereto.

**D.**

**RELIEF AND ORDER**

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.
2. Within 31 days of receipt of the undersigned's Order granting reasonable attorneys fees and cost in an aggregate amount to be determined after submissions pursuant to Conclusion of Law Number 9, the respondent shall pay said reasonable attorneys fees and costs so awarded.
3. Within 60 days of the receipt of this decision, the respondent shall pay the complainant incidental damages in the amount of \$1600.00 for humiliation, embarrassment, emotional distress and loss of personal dignity as a result of respondent's unlawful discrimination.

4. The respondent shall pay ten percent annum interest on any monetary relief awarded.
5. The undersigned will enter a supplemental Order regarding back pay.

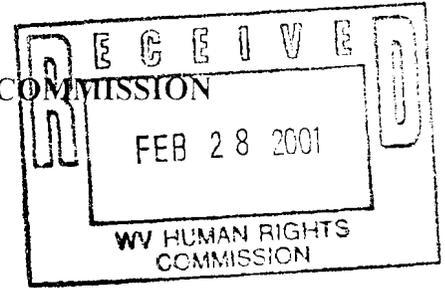
It is so **ORDERED**

Entered this 10<sup>th</sup> day of January, 2001

**WEST VIRGINIA HUMAN RIGHTS COMMISSION**

BY:   
\_\_\_\_\_  
KATHERINE L. DOOLEY  
ADMINISTRATIVE LAW JUDGE

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION



PATTI A. SMITH,  
Complainant,

Docket Number: EH-57-98

UNITED PARCEL SERVICE,  
Respondent.

SUPPLEMENTAL ORDER

Pursuant to the prior order of the Administrative Law Judge, the undersigned is in receipt of and has reviewed the Complainant's submission for Entitled Back Pay and Computations Employed in the Calculation and the Respondent's Objection to Complainant's Submission for Entitled Back Pay and Computation Employed in the Calculation for consideration in determining back pay due to the Complainant and the Complainant's Request for Attorney Fees and Expenses.

After carefully reviewing the submissions of counsel, the undersigned is of the opinion that the Complainant would have been entitled to back pay from July 10, 1999 through February 1, 2001 minus any set off for salary earned from her currently employer, BASF.

It was the Order of this Court that the Complainant was entitled to back wages for two part-time inside jobs with the Respondent. According to the provisions of the National Master United Parcel Service Agreement and Atlantic Area Supplemental Agreement for Part-Time Employees, part-time employees were guaranteed three and one-half hours per day and the part-time hourly rate, adjusted for the Complainant's seniority, is as follows:

7/10/99 to 7/31/99 = \$16.09  
8/01/99 to 7/31/00 = \$16.89  
8/01/00 to 2/01/01 = \$17.74.

According to the calculations submitted by the Respondent, the Complainant would have earned \$52,673.20 for the period between July 10, 1999 and February 1, 2001.

Her earnings at BASF were, for the same period, \$53,705.80.

Therefore, I do not find that the Complainant is entitled to any back pay.

The Complainant's request for attorney's fees, as supported by the affidavit by Dwight J. Staples in the amount of \$33,460.00 and expenses in the amount of \$2,455.00 for a total of \$35,860.55, are hereby granted. By prior Order of the undersigned, the Complainant is entitled to \$1,600.00 for humiliation, embarrassment, emotional distress and loss of personal dignity as a result of Respondent's unlawful discrimination.

The Objections and Exceptions of the Parties aggrieved by this Order are duly noted.

**IT IS HEREBY ORDERED.**

Entered this 27<sup>th</sup> day of February, 2001.  
**West Virginia Human Rights Commission**

BY



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**Katherine L. Dooley, Esq.**  
Administrative Law Judge  
P. O. Box 11270  
Charleston, WV 25339-1270  
Telephone: (304) 346-4200  
Facsimile: (304) 346-4199

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PATTI A. SMITH,  
Complainant,

Docket Number: EH-57-98

UNITED PARCEL SERVICE,  
Respondent.

CERTIFICATE OF SERVICE

I, Katherine L. Dooley, Administrative Law Judge in the above-styled matter, do hereby certify that I have served the foregoing Supplemental Order, by placing true and exact copies in the United States Mail, postage pre-paid, this 27<sup>th</sup> day of February, 2001, addressed as follows:

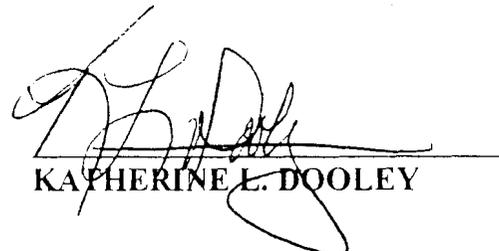
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United Parcel Service  
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KATHERINE L. DOOLEY